Supreme Court, U.S.
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No. 06- **06-868** DEC 19 2006

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In the Supreme Court of the United States

ELOUISE PEPION COBELL, *ET AL.*, PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY,
DEPARTMENT OF THE INTERIOR, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding — in conflict with *Liteky v. United States*, 510 U.S. 540 (1994), and decisions of other circuits — that it could order the district judge recused and the case reassigned under 28 U.S.C. §§ 455(a) and 2106 based on its reversals of some of the district judge's rulings in this case.

PARTIES TO THE PROCEEDING

The following were the parties to the proceedings before the United States Court of Appeals for the District of Columbia Circuit:

1. Elouise Pepion Cobell

2. Penny Cleghorn

3. Thomas Maulson

4. Earl Oldperson

5. James Louis LaRose

6. Members of a class defined by the district court to include all past and present Indians (including all original allottees, their heirs, and individual Indian successors-in-interest, including executors and personal representatives) on whose behalf, as Trust beneficiaries, Trust accounts are, have been, should be, or should have been established and maintained by the United States government to hold revenues generated by the Individual Indian Trust

7. Dirk Kempthorne, Secretary, Department of the Interior, in his official capacity

8. The Assistant Secretary of the Department of the Interior for Indian Affairs (currently vacant), in his or her official capacity

9. Henry M. Paulson, Secretary, Department of the Treasury, in his official capacity

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
TABLE OF APPENDICES	xi
OPINIONS BELOW	1
STATUTORY PROVISION INVOLVED	1
JURISDICTION	1
STATEMENT	1
A. The Trust.	2
B. Trust Mismanagement.	3
C. Proceedings In This Case.	6
1. Initial proceedings.	6
2. The initial trial and *Cobell VI*.	7
3. Post-*Cobell VI* proceedings.	9
4. The present proceedings.	14

Contents

	Page
REASONS FOR GRANTING THE PETITION ...	15
I. THIS CASE CALLS FOR THE COURT'S REVIEW.	15
II. THE COURT OF APPEALS' REASSIGNMENT DECISION IS ERRONEOUS AND IN CONFLICT WITH *LITEKY* AND THE APPROACH FOLLOWED IN OTHER CIRCUITS.	19
CONCLUSION	29

TABLE OF AUTHORITIES

Cases *Page*

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 16

Babbitt v. Youpee, 519 U.S. 234 (1997) 2

Cobell v. Babbitt (Cobell V), 91 F.Supp.2d 1 (D.D.C. 1999) 3, 4, 5, 7, 26

Cobell v. Norton (Cobell VI), 240 F.3d 1081 (D.C. Cir. 2001) ..... *passim*

Cobell v. Norton, 212 F.R.D. 14 (D.D.C. 2002) ... 6

Cobell v. Norton, 206 F.R.D. 27 (D.D.C. 2002) ... 6

Cobell v. Norton, 206 F.R.D. 324 (D.D.C. 2002) .. 6

Cobell v. Norton (Cobell VII), 226 F.Supp.2d 1 (D.D.C. 2002) 9, 10

Cobell v. Norton, 226 F.Supp.2d 175 (D.D.C. 2002) 6

Cobell v. Norton (Cobell VIII), 334 F.3d 1128 (D.C. Cir. 2003) 10, 24, 25-26

Cobell v. Norton, 213 F.R.D. 16 (D.D.C. 2003) ... 6

Cobell v. Norton, 214 F.R.D. 13 (D.D.C. 2003) ... 6

Cobell v. Norton, 2003 WL 22867626 (D.C. Cir. Dec 2, 2003) 9

Authorities

Page

Cobell v. Norton (*Cobell X*), 283 F.Supp.2d 66 (D.D.C.2003) 12

Cobell v. Norton (Cobell XI), 310 F.Supp.2d 77 (D.D.C. 2004) 11

Cobell v. Norton (Cobell XII), 391 F.3d 251 (D.C. Cir. 2004) ..... *passim*

Cobell v. Norton (Cobell XIII), 392 F.3d 461 (D.C. Cir. 2004) 12, 13, 23, 25

Cobell v. Norton (Cobell XIV), 357 F.Supp.2d 298 (D.D.C. 2005) 13

Cobell v. Norton (*Cobell XV*), 229 F.R.D. 5 (D.D.C. 2005) 1

Cobell v. Norton (*Cobell XVI*), 394 F.Supp.2d 164 (D.D.C. 2005) 11

Cobell v. Norton (Cobell XVII), 428 F.3d 1070 (D.C. Cir. 2005) 13, 27, 28

Cobell v. Norton (*Cobell XVIII*), 455 F.3d 317 (D.C. Cir. 2006) 1, 27

Cobell v. Kempthorne (Cobell XIX), 455 F.3d 301 (D.C. Cir. 2006) 12, 27, 28

Ex parte American Steel Barrel Co., 230 U.S. 35 (1913) 20, 23

Authorities

Page

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 8

Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911) 26

Hodel v. Irving, 481 U.S. 704 (1987) 2

In re Allied-Signal Inc., 891 F.2d 967 (1st Cir. 1989), *cert. denied*, 495 U.S. 957 (1990) 19

In re Boston's Children First, 244 F.3d 164 (1st Cir. 2001) 21

In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004) 13

In re Corrugated Container Antitrust Case, 752 F.2d 137 (5th Cir.), *cert. denied*, 473 U.S. 911 (1985) 18

In re Focus Media, Inc., 378 F.3d 916 (9th Cir. 2004), *cert. denied*, 544 U.S. 968 (2005) 21

In re J.P. Linahan, Inc., 138 F.2d 650 (2d Cir. 1943) 21

In re Kempthorne, 449 F.3d 1265 (D.C. Cir. 2006) 13, 24

In re United States, 441 F.3d 44 (1st Cir.), *cert. denied*, 127 S.Ct. 288 (2006) 21

Authorities

Page

Int'l Union United Mine Workers of Am. v. Bagwell, 512 U.S. 821 (1994) 26

Koller v. Richardson-Merrell Inc., 737 F.2d 1038 (D.C. Cir. 1984), *vacated on other grounds*, 472 U.S. 424 (1985) 17, 18, 19

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 23

Liteky v. United States, 510 U.S. 540 (1994) .....
.....i, 18, 19, 20, 21

Little Rock School Dist. v. Pulaski County Special School Dist., 839 F.2d 1296 (8th Cir.), *cert. denied*, 488 U.S. 869 (1988) 21

McLaughlin v. Union Oil Co. of Cal., 869 F.2d 1039 (7th Cir. 1989) 21

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 8

Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co., 535 U.S. 229 (2002) ... 23

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 8

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir.) (*en banc*), *cert. denied*, 534 U.S. 952 (2001) 18

Authorities

Page

United States v. Robin, 553 F.2d 8 (2d Cir. 1977) (*en banc*) 17

Statutes and Rules

General Allotment Act, ch. 119, 24 Stat. 388 (1887) (as amended, 25 U.S.C. §§ 331 *et seq.*) 2

American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (1994) (codified as amended in scattered sections of 25 U.S.C.) 5

Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 108-108, 117 STAT. 1241 (2004) 12, 13

25 U.S.C. §§ 161-161a (2000) 2

25 U.S.C. §§ 4001- 4011 (2000) 2

28 U.S.C. § 455(a)-(b) (2000) ..... i, 1, 14

28 U.S.C. § 1254(1) (2000) 1

28 U.S.C. § 1292(b) (2000) 7

28 U.S.C. § 2106 (2000) ..... i, 1, 14

Fed. R. Civ. P. 23(d) ..... i, 14

Authorities

Page

Other Authorities

Bureau of Municipal Research, 63rd Cong., Report to the Joint Commission to Investigate Indian Affairs: Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs at 2 (Comm. Print 1915) 3, 4

Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-449 (1992) 4, 5

12 MOORE'S FEDERAL PRACTICE § 63.20[8][b] at 63-32.1 (3d ed. 2006) 17

Jack B. Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*, 120 F.R.D. 267 (1988) ... 17

The Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980*, (September 2006) 18

ABA, *Report of the Joint Commission to Evaluate the Model Code of Judicial Conduct* (Oct. 31, 2006) 21, 26, 27

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The District Of Columbia Circuit Decided July 11, 2006 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The District Of Columbia Dated July 12, 2005 ..... 39a

Appendix C — Order Of The United States Court Of Appeals For The District Of Columbia Circuit Denying Petition For Rehearing En Banc Filed September 26, 2006 ..... 89a

Appendix D — Order Of The United States Court Of Appeals For The District Of Columbia Circuit Denying Petition For Rehearing Filed September 26, 2006 ..... 91a

Petitioners, named plaintiffs Elouise Pepion Cobell, *et al.*, on behalf of themselves and a certified class of all past and present Individual Indian Trust beneficiaries, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App, *infra*, 1a-38a) is reported at 455 F.3d 317. The opinion of the district court (App., *infra*, 39a - 88a) is reported at 229 F.R.D. 5.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2006. A timely petition for rehearing was denied on September 26, 2006 (App., *infra*, 89a-92a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The removal of a sitting federal district judge on the ground of apparent judicial bias is a grave and delicate matter. And it is never more grave and delicate than where, as here, it is based on an assessment of the substantive correctness of the judge's legal decisions. A trial court's errors are subject to correction through judicial review; they should not afford a ready basis for a dissatisfied litigant to attack the judge and, by requesting the appellate court to reassign the case to a different judge, engage in "judge shopping." To allow otherwise would be a disservice to district judges, to litigants, and to judicial independence.

This issue is squarely presented here. This is a highly publicized and crucially important Indian Trust case against the federal government, involving a century-old, and continuing,

breach of trust duties and the resulting mismanagement of tens of billions of dollars belonging to approximately 500,000 of the poorest Americans. The case has historical roots extending back to the founding and development of our nation and contemporary consequences directly affecting the physical and economic well being of the Native American plaintiffs today. Judge Lamberth has presided over this case since its filing 10 years ago. Now, however, the court of appeals has removed him from the litigation because it believed its reversal of some of his rulings supported an appearance of bias. Because that decision is erroneous, conflicts with decisions of this Court and of other circuits, and threatens to impede the ultimate resolution of this decade-old lawsuit brought to redress the government's century-long breaches of trust, this Court's review is warranted.

A. The Trust.

The Trust that is the subject of this litigation – called the Individual Indian Money ("IIM") Trust – was initially established in 1887 pursuant to the General Allotment Act, ch. 119, 24 Stat. 388 (as amended, 25 U.S.C. §§ 331 *et seq.* (2000)). The United States acts as Trustee and its trust duties have been delegated principally to the Secretary of the Interior and the Secretary of the Treasury ("Trustee-Delegates"). *See, e.g.*, 25 U.S.C. §§ 161-161a, 4001- 4011 (2000). Trustee-Delegates are responsible for, *inter alia*, leases and sales of resources from Trust lands and collection, investment, and disbursement of the proceeds. The Trust assets are owned by the individual Indian beneficiaries and *are their private property*,[1] but these assets are under the complete custody and control of the United States as Trustee. *Id.*

At one time, approximately 54,000,000 acres of land were held in trust. Today, approximately 11,000,000 acres remain. No one knows how much trust revenue has been generated from the sale or lease of Trust assets and paid to the correct beneficiary in the correct amount.

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[1] *See Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987).

The Trust assets are of great value. As early as 1915, Trust assets were valued at $1 billion.[2] In addition to millions of acres of land, oil, gas, coal, timber, and other valuable natural resources held in trust, Trustee-Delegates acknowledge that at any given time, they hold approximately $400 million in 260,000 separate trust accounts. Petitioner-beneficiaries contend that the account balances, if properly stated, would amount to tens of billions of dollars more. Trustee-Delegates also now concede that annually at least $300 million is produced in lease and royalty proceeds from individual Indian Trust lands. *See* Trustee-Delegates' Fiduciary Obligations Compliance Plan at 4 (Jan. 6, 2003) (Dkt. No. 1707). The government's own contractor placed the amount of government liability in this action "somewhere between $10 billion and 40 billion."[3]

B. Trust Mismanagement.

There is no dispute that the Trust has been severely and consistently mismanaged over its entire life and that an accounting has *never* been done. *See, e.g., Cobell v. Norton (Cobell VI)*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) ("[t]he trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long"). Even today, "the Interior Department [does] not know the proper number of [trust] accounts" it manages, "it does not know the proper balances . . . , nor does Interior have sufficient records to determine the value of IIM accounts." *Id.* at 1089. Indeed, "'[a]lthough the United States freely gives out "balances" to plaintiffs, it admits that currently these balances cannot be supported by adequate transactional documentation.'" *Id.* (quoting *Cobell v. Babbitt (Cobell V)*, 91 F.Supp.2d 1, 10 (D.D.C. 1999)). Consequently, Trustee-Delegates "regularly issue[] payments to trust beneficiaries 'in erroneous amounts –

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[2] *See* Bureau of Municipal Research, 63rd Cong., Report to the Joint Commission to Investigate Indian Affairs: Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs at 2 (Comm. Print 1915) ("Joint Commission Report").

[3] *See* SRA International Risk Assessment at 5-1 (Jan. 18, 2002).

from unreconciled accounts – some of which are known to have incorrect balances.'" *Id.* (quoting *Cobell V,* 91 F.Supp.2d at 6).

The government has long been aware of its mismanagement. A 1915 congressional report described in detail the already broken trust that resulted from "fraud, corruption and institutional incompetence almost beyond the possibility of comprehension." *See* Joint Commission Report at 2. In every decade since then, reports have been issued by various government entities and private auditors identifying the many ongoing failures of the trust management and accounting system. "The General Accounting Office, Interior Department Inspector General, and Office of Management and Budget, among others, have all condemned the mismanagement of the IIM trust accounts over the past twenty years." *Cobell VI,* 240 F.3d at 1089.

Faced with this shameful record, "[t]ime and again Interior Department officials pledged to address these concerns. Yet, as Interior officials readily acknowledge, there has been little progress at reforming the management of IIM trust accounts." *Id.* Even today, "the federal government readily acknowledges that it is in breach of at least some of the fiduciary duties owed to IIM beneficiaries." *Id.* at 1090. Congress took notice and

> [b]eginning in 1988, . . . held oversight hearings on Interior's management of the Indian trust accounts. These hearings led to a report, *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund,* H.R.Rep. No. 102-499 (1992) [1992 WL 83494], . . . which harshly criticized the Interior Department's mishandling of the trust accounts. Consistent with prior analyses, the report found, "significant, habitual problems in BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds." *Id.* at 2.

Id.

Trustee-Delegates' breaches of trust have caused and continue to cause severe hardship to Indian beneficiaries. "Interior's persistent failure to meet its obligations led the congressional investigators to conclude that top officials 'have utterly failed to grasp the human impact of its financial management.'" *Id.* (quoting *Misplaced Trust* at 5). The consequences of these breaches to the beneficiaries are dire; as the court of appeals recognized more than five years ago when it first held that the government had breached its fiduciary obligations:

> "The longer defendants delay in creating the plans necessary to render an accounting, the greater the chance that plaintiffs will never receive an actual accounting of their own trust money." . . . Given that *many plaintiffs rely upon their IIM trust accounts for their financial well-being*, the injury from delay could cause irreparable harm to plaintiffs' interests as IIM trust beneficiaries. Thus, it seems that *'the interests at stake are not merely economic interests . . . but personal interests in life and health.*"

Id. at 1097 (emphasis added) (citations omitted). Furthermore, the situation is particularly troubling and "far more inexcusable than [if it involved a] garden-variety trust" since Indian Trust beneficiaries "did not willingly relinquish pervasive control of their money to the United States. The United States imposed this trust on the Indian people." *Cobell V*, 91 F.Supp.2d at 6.

In 1994, Congress enacted the Indian Trust Fund Management Reform Act ("1994 Act"), Pub. L. No. 103-412 (1994). The 1994 Act is a "remedial statute" that recognized and codified "the federal government's preexisting trust responsibilities" and required Trustee-Delegates to bring themselves into compliance with their fiduciary duties. *Cobell VI*, 240 F.3d at 1096, 1090. Regrettably, Trustee-Delegates responded with more foot-dragging and continuing breaches of trust. *See* App., *infra*, 37a ("five years later, no remedy is in sight").

C. Proceedings In This Case.

1. Initial proceedings.

Unwilling to accept further delay, five named plaintiffs brought this action on June 10, 1996, on behalf of themselves and approximately 500,000 individual Indian Trust beneficiaries. They sought remedies commonly available to trust beneficiaries to cure the alleged breaches, including the provision of an adequate accounting, restatement of account balances, and reform of the broken trust system.

The case has proven to be both complex and voluminous. In the district court, there have been more than 3,250 filings, 60 published decisions, and 200 days of testimony in various trial proceedings. The Honorable Royce C. Lamberth has been the presiding judge in the case from its inception.

As the district court has repeatedly found, Trustee-Delegates have obstructed and delayed the proceedings in this case. For example, as early as 1999, the district court held government officials "in contempt of court for failing to comply with the court's production orders and imposed monetary sanctions." *Cobell VI*, 240 F.3d at 1093. *See also id.* (this conduct was "egregious" and "compounded" by the "contemporaneous destruction of documents"). Since then, the government has been sanctioned on numerous occasions for, *inter alia*, retaliating against witnesses, submitting false reports and sworn declarations, destroying documents, violating court orders, and filing frivolous briefs.[4]

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[4] *See, e.g., Cobell v. Norton*, 214 F.R.D. 13 (D.D.C. 2003) (sanctions for knowingly filing false declaration that the court described as "misconduct . . . that . . . was egregious and undertaken in bad faith); *Cobell v. Norton*, 212 F.R.D. 14 (D.D.C. 2002) (counsel's violation of no-contact rule in attempt to extinguish rights of juveniles and other vulnerable class members); *Cobell v. Norton*, 206 F.R.D. 27 (D.D.C. 2002) (filing frivolous motion); *Cobell v. Norton*, 206 F.R.D. 324, 324-25 (D.D.C. 2002) (filing frivolous motion regarding cover-up of evidence spoliation); *Cobell v. Norton*, 213 F.R.D. 16, 28-32 (D.D.C. 2003) (counsel's disruption of deposition with baseless objections and frivolous motion); *Cobell v. Norton*, 226 F.Supp.2d 175 (D.D.C. 2002) (show cause granted for violating anti-retaliation order).

2. The initial trial and *Cobell VI*.

In 1998, the district court divided this litigation into two phases. Phase I was designed to fix the trust system going forward and focused on reforming the management and accounting of the IIM Trust. Phase II would determine the adequacy of the historical accounting and to correct plaintiff-beneficiaries' trust account balances in conformity with the ultimate accounting. *Cobell VI*, 240 F.3d at 1093.

In 1999, following a six-week trial, the district court held that Trustee-Delegates had breached their fiduciary duties to plaintiffs, including the duty to account. *Cobell V*, 91 F.Supp.2d 1. Trustee-Delegates appealed pursuant to 28 U.S.C. § 1292(b), arguing, *inter alia*, (1) that they did not have duties remotely akin to those of a trustee; (2) that, specifically, they had no duty to account prior to enactment of the 1994 Act; (3) that they were not in breach of trust; (4) that their conduct must be judged deferentially and, in particular, that *Chevron* deference is applicable; and (5) that even if they breached their fiduciary duties, the district court had only the limited authority to identify the breaches and could not grant traditional equitable relief to ensure that Trustee-Delegates were brought into compliance with their trust obligations.

The D.C. Circuit rejected each and every one of these arguments, affirming the district court in all material respects. *Cobell VI*, 240 F.3d 1081. The court held that the United States owes "longstanding and substantial trust obligations to Indians, particularly to IIM trust beneficiaries, not the least of which is a duty to account." *Id.* at 1098. In addition, *Cobell VI* concluded that Trustee-Delegates, "[b]y failing to take reasonable steps toward the discharge of the federal government's fiduciary obligations to IIM trust beneficiaries, . . . breached their duties" including "[m]ost significantly" the duty to "provide an adequate accounting." *Id.* at 1106.

In so ruling, the court of appeals held that Trustee-Delegates are governed by traditional fiduciary duties under trust law and rejected their argument that they are subject only to the more

deferential approach typically applied to administrative agencies. *Id.* at 1100-01. The court explained that although "ordinarily we defer to an agency's interpretations of ambiguous statutes entrusted to it for administration," here "*Chevron* deference is not applicable" in light of the trust relationship between Trustee-Delegates and the beneficiaries and the "governing canon of construction requir[ing] that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Id.* (quoting *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985)); s*ee also id.* at 1103. Where, as here, "'the Secretary is obligated to act as a fiduciary . . . then his actions must not merely meet the minimal requirements of administrative law, but also must pass scrutiny under the more stringent standards demanded of a fiduciary.'" *Id.* at 1104 (citation omitted). Thus, "the Secretary 'cannot escape his role as trustee by donning the mantle of administrator' to claim that courts must defer to his expertise and delegated authority." *Id.* at 1099 (citation omitted).

Finally, the court of appeals addressed the district court's remedial power to enforce the fiduciary duties owed to the beneficiary-class. Observing that "there is little reason to believe that, absent court intervention, these duties will be discharged any time soon" (*id.* at 1105), it held that the district court possessed "broad equitable powers in ordering specific relief." *Id.* at 1108. The court explained that where "'a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order *any appropriate relief*.'" *Id.* (emphasis in original) (quoting *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 69 (1992)). Under traditional principles of equity, "'[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies,'" and merely because "this case involves decades-old Indian trust funds rather than segregated schools does not change the nature of the court's remedial powers." *Cobell VI,* 240 F.3d at 1108 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)).

Thus, "the district court has substantial ability to order that relief which is necessary to cure the appellants' legal transgressions" and "was justified in fashioning equitable relief that would ensure the vindication of plaintiffs' rights." *Id.*

3. Post-*Cobell VI* proceedings.

Since *Cobell VI*, the district court has struggled mightily to ensure Trustee-Delegates' compliance with trust duties. This effort has led to over 50 post-*Cobell VI* published decisions of the district court (and more than a hundred other unpublished rulings or orders). Of these, Trustee-Delegates have appealed nine.[5]

Of the nine appeals taken by Trustee-Delegates, one was dismissed with prejudice.[6] The remainder vividly demonstrate the wide range of issues and challenges that have confronted the district court in wrestling with various knotty and complicated legal questions that have arisen in this litigation involving (as the court of appeals itself has variously described it) "recalcitran[t]"[7] and "intransigen[t]"[8] Trustee-Delegates who commit "malfeasance"[9] that "egregiously breach[es]"[10] their trust duties and "unconscionabl[y] delay[s]"[11] the discharge of their fiduciary obligations.

Given the difficult and often unprecedented questions presented in this case, it is hardly surprising that the court of appeals has disagreed with some of the rulings of the district court. On the other hand, in a number of these appeals, the D.C. Circuit in fact has upheld the district court's basic legal reasoning

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[5] Petitioner-beneficiaries have not sought to appeal any of the rulings against them – not because they agreed with the decisions but because they wanted the case to move forward expeditiously.

[6] *Cobell v. Norton*, 2003 WL 22867626 (D.C. Cir. Dec 2, 2003).

[7] *Cobell VI*, 240 F.3d at 1109

[8] *Cobell v. Norton (Cobell VII)*, 226 F.Supp.2d 1, 142 (D.D.C. 2002)

[9] *Cobell VI*, 240 F.3d at 1109

[10] *Cobell v. Norton (Cobell XII)*, 391 F.3d 251, 257 (D.C. Cir. 2004).

[11] *Cobell VI*, 240 F.3d at 1096.

and vacated or reversed on procedural grounds or even on the basis of an intervening change in law or an error of the Special Master rather than of Judge Lamberth.

a. The first appeal was from a civil contempt citation against the Secretary of Interior and Assistant Secretary for Indian Affairs. *Cobell v. Norton* (*Cobell VIII*), 334 F.3d 1128 (D.C. Cir. 2003). The district court awarded sanctions in the form of attorneys' fees and expenses related to the prosecution of the civil contempt. In reversing, the D.C. Circuit held that such sanctions were neither coercive nor compensatory and thus the contempt was "functionally" criminal in nature. *Id.* at 1140. In reaching this conclusion, the court did not disagree with Judge Lamberth's factual finding that Trustee-Delegates "cannot be trusted to report in a timely manner complete and accurate information regarding the status of trust reform and their efforts to discharge their fiduciary responsibilities properly." *Cobell VII*, 226 F.Supp.2d at 159. On the contrary, the court of appeals itself criticized Trustee-Delegates for the underlying conduct, pointedly noting that the reports Trustee-Delegates issued on their reform efforts "were misleading about the progress being made in ways painstakingly identified by the district court." *Cobell VIII,* 334 F.3d at 1149.

b. Meanwhile, in 2001, it came to light that individual Indian Trust data (IITD) were subject to manipulation and corruption because of the complete lack of information technology security on Interior's computer system. Trustee-Delegates conceded shortly thereafter that "[I]nterior defendants recognize significant deficiencies in the security of information technology systems protecting individual Indian trust data. Correcting these deficiencies merits [I]nterior defendant's immediate attention." December 17, 2001 Consent Order at 4 (Dkt. No. 1063). Despite this recognition, Trustee-Delegates failed to correct these deficiencies, and vital IITD remained (and remain today) at serious risk.

After initially taking lesser steps to protect IITD, on March 15, 2004, the district court entered an injunction requiring certain

internet disconnection. *Cobell v. Norton (Cobell XI)*, 310 F.Supp.2d 77 (D.D.C. 2004). The government appealed.

In *Cobell XII*, the D.C. Circuit emphatically rejected Trustee-Delegates' fundamental legal contentions as "unpersuasive." 391 F.3d at 256-57. The court concluded that Trustee-Delegates had "ignored" *Cobell VI* and "mischaracteriz[ed]" the injunction entered by the district court. *Id.* at 257-58. In particular, it held that the district court's "jurisdiction properly extends to security of Interior's information technology systems" and that the lower court "possessed authority on remand from *Cobell VI* to issue a preliminary injunction regarding IT security." *Id.* at 253-54, 256. The court also made clear that, contrary to Trustee-Delegates' contention, the district court had substantial "discretion as a court of equity in fashioning a remedy to right a century-old wrong" and that "the narrower judicial powers appropriate under the APA do not apply" to this Indian Trust case. *Id.* at 257. *Cobell XII* thus rejected *all* of the legal challenges to the injunction. *Id.* at 258.

However, the court of appeals vacated the district court's order on narrow procedural grounds. It directed the court below to consider government declarations that had previously been rejected as formally defective and hold an evidentiary hearing that would update the record with more current information. *Id.* at 258-59.

Following a 59-day evidentiary hearing upon remand, the district court found that "[t]here is no question that these problems, in the aggregate, demonstrate that the confidentiality, integrity, and availability of IITD on Interior's IT systems are presently at substantial and imminent risk of compromise." *Cobell v. Norton* (*Cobell XVI*), 394 F.Supp.2d 164, 272 (D.D.C. 2005). Pursuant to the legal principles enunciated in *Cobell XII*, the court ordered certain Interior computers disconnected from the internet and intranet. *Id.* at 277-78.

Trustee-Delegates again appealed but did "not challenge" the "extensive findings of fact" that served as the basis of the

district court's injunction. *Cobell v. Kempthorne (Cobell XIX)*, 455 F.3d 301, 308 (D.C. Cir. 2006). The D.C. Circuit agreed with the district court that "the evidence of flaws in Interior's IT security is extensive" and recognized that it would be "naïve to deny the possibility that . . . an [unauthorized] individual may indeed hack into Interior's systems and even alter IITD." *Id.* at 315. Nevertheless, the court of appeals held that the injunction was an abuse of discretion because this possibility was not substantial enough and the harm to Interior "outweighs the class members' need for an injunction." *Id.* at 317.[12]

c. Since *Cobell VI* in early 2001, Trustee-Delegates have remained in breach of their fiduciary duties. Accordingly, in September 2003, after extensive proceedings and detailed findings of fact, the district court entered a structural injunction to establish a mechanism for them to fulfill their accounting obligations. *Cobell v. Norton* (*Cobell X*), 283 F.Supp.2d 66, 287-95 (D.D.C.2003). Once again, Trustee-Delegates appealed. Subsequent to the district court's order, Congress enacted an appropriations rider providing, in pertinent part, that no federal statute or other law "shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until . . . December 31, 2004." Pub. L. No. 108-108. Based on this intervening change in law, the court of appeals vacated the historical-accounting aspects of the structural injunction. *Cobell v. Norton (Cobell XIII)*, 392 F.3d 461, 465-66 (D.C. Cir. 2004). However, noting that this appropriations measure provided Trustee-Delegates only "temporary relief from . . . engag[ing] in historical accounting for the IIM accounts," the court made clear that "obviously Pub. L. No. 108-108 will cease to bar the historical accounting provisions of the injunction" after December 31, 2004, and expressly did "not address the

[12] This decision is the subject of a separate petition for certiorari filed contemporaneously herewith.

issues that would be relevant if the district court then reissued those provisions." *Id.* at 466, 468.[13]

Thereafter, upon expiration of Pub. L. No. 108-108, the district court re-entered the same historical-accounting injunction. *Cobell v. Norton (Cobell XIV)*, 357 F.Supp.2d 298 (D.D.C. 2005). In *Cobell v. Norton (Cobell XVII)*, 428 F.3d 1070 (D.C. Cir. 2005), the D.C. Circuit vacated the historical-accounting injunction on the merits. Despite *Cobell VI*'s holding that "*Chevron* deference is not applicable" in this Indian Trust case, the appellate court ruled that the injunction was an abuse of discretion because "the district court owed substantial deference to Interior's plan" and must provide "deference to administrators." *Id.* at 1076.

d. Two other appellate proceedings addressed attempts to recuse Judge Lamberth from contempt proceedings against certain government employees and the suppression of certain reports by the Special Master looking into alleged violations of various orders by those individuals. First, in *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004), the employees sought mandamus to remove Judge Lamberth and the Special Master. The court of appeals held that Judge Lamberth's impartiality in any contempt proceedings could not reasonably be questioned and therefore denied mandamus. *Id.* at 1046. However, it granted mandamus against the Special Master because of his investigatory role in earlier phases of the case. *Id.*

Second, Trustee-Delegates sought mandamus directly from the court of appeals to suppress three reports by a Special Master who had previously resigned. *In re Kempthorne*, 449 F.3d 1265, 1266 (D.C. Cir. 2006). Although the court granted the writ, the grounds for the decision related only to the actions of the Special

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[13] *Cobell XIII* also vacated, in part, the provisions of the structural injunction requiring Trustee-Delegates to take steps to comply with their trust duties other than the historical-accounting. *See* page 25 note 22, *infra.* Notably, the court of appeals rejected, and indeed expressed "puzzle[ment]" at, Trustee-Delegates' suggestion that fixing the broken trust system "represent[ed] an expansion of the lawsuit." *Id.* at 470.

Master and did not involve any rulings of – let alone errors by – Judge Lamberth.

4. The present proceedings.

The present appeal arises from the district court's order providing notice to class members pursuant to Fed. R. Civ. P. 23(d). App., *infra,* 39a-88a. While the court of appeals recognized that "Interior's trust account information has serious reliability problems," it nevertheless held that requiring a notice stating the information "may be unreliable" was not authorized by Rule 23(d). App., *infra,* 14a.

In addition, Trustee-Delegates objected to harsh language in the district court's opinion regarding their misconduct and malfeasance in the manner they have managed the trust and litigated the case. Based on such language together with the D.C. Circuit's prior reversals, Trustee-Delegates requested that the court of appeals reassign the case to a new district judge pursuant to 28 U.S.C. § 2106. In the same opinion reversing the Rule 23(d) order, the court also granted the motion to reassign based on the conclusion that an objective observer "might reasonably . . . question[]" Judge Lamberth's "impartiality." *See* 28 U.S.C. § 455(a). In basing reassignment on this appearance of partiality, the court did not determine or even suggest that Judge Lamberth was actually biased or prejudiced. *See* 28 U.S.C. § 455(b).

The court of appeals' ruling rested on the combination of two considerations. The court acknowledged that much of Judge Lamberth's "harsh – even incendiary – language" properly reflected the fact that Trustee-Delegates have "flagrantly and repeatedly breached [their] fiduciary obligations." App., *infra*, 32a. The court also recognized that it too had "referred to Interior's 'malfeasance,' 'recalcitrance,' 'unconscionable delay,' 'intransigen[ce],' and 'hopelessly inept management.'" *Id.* And it emphasized that "Interior's deplorable record deserves condemnation in the strongest terms. Words like 'ignominious' and 'incompeten[t]' (the district court's) and 'malfeasance' and 'recalcitrance' (ours) are fair and well-supported by the record."

Id. at 33a. Nonetheless, the court was concerned that some of the district court's statements went "further" and "could contribute to a reasonable observer's belief" that Judge Lamberth might appear to be partial. *Id.* at 32a, 34a.

However, the court of appeals did "not decide" whether these statements, "standing alone, required reassignment." *Id.* at 34a. Instead, it considered the aggregate of the harsh language along with what it termed "an unbroken string of [eight] reversed district court orders." *Id.* Based on "the combination of the [statements in] the July 12 order and the nature of the [reversed] district court[] actions," the court "conclude[d], reluctantly," that reasonable objective observers would not "have confidence that [Judge Lamberth's] decisions flow from the impartial application of law to fact." *Id.* at 37a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE CALLS FOR THE COURT'S REVIEW.

This case is of historical significance both in its importance and in its duration and complexity. As to the former, the litigation involves the rights of some 500,000 Native Americans to seek redress for the government's longstanding and continuing breaches of fundamental trust duties and for the resulting losses they suffered *to their own property* held in trust by the government. By the estimate of the government's own contractor, approximately $10 billion-$40 billion is at stake. Because many petitioner-beneficiaries rely on trust benefits for their subsistence, the lawsuit directly affects their "'personal interests in life and health.'" *Cobell VI*, 240 F.3d at 1097 (citation omitted).

As to the latter, the litigation concerns a trust that was established in 1887. In the subsequent 120 years, the government as Trustee has *never* fulfilled its fiduciary duties to petitioners. To right that grievous violation of trust responsibilities, petitioners instituted this lawsuit in 1996. During the next 10 years, the case has been actively litigated and has proven to be both massive and arduous. And, unfortunately, the end is nowhere in sight.

Judge Lamberth has presided over the case from its inception and has a unique and invaluable mastery of all its aspects. Indeed, it is largely due to Judge Lamberth's firm management of the case that the government has made any effort at all to comply with its fiduciary duties. *See Cobell VI*, 240 F.3d at 1097 ("[w]hat little progress the government has made appears [to be] due to the litigation").

It is impossible in short compass, and on a cold record, to demonstrate Judge Lamberth's command of this litigation. Suffice it to say for present purposes that he has been deeply involved in, and is intimately familiar with, every aspect of law and fact in this complicated case. Indeed, it is not an overstatement to say that he has "lived" the case for 10 years. It is his management that has structured the proceeding. It is his discretion that has guided the case and resolved the manifold issues, large and small, that have continually arisen. It is, in ways undisturbed by appellate reversals, his legal analysis that is the foundation for the proceedings yet to come. And, of central importance, it is Judge Lamberth who has seen the multitude of witnesses at the various proceedings as well as the government's counsel and formed judgments about their veracity, character, and good faith. *See, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985). In sum, Judge Lamberth has a unique understanding of this case that is both invaluable and irreplaceable.

Now, after this extensive course of litigation, the court of appeals has ordered that Judge Lamberth be removed and the case reassigned to another judge. It based this extraordinary decision on its conclusion that, although *Judge Lamberth had no actual bias*, an objective observer would reasonably believe that he appeared not to be impartial.

It does not deprecate the importance of the appearance of impartiality in our judicial system to suggest that only the clearest and most compelling considerations could justify this reassignment. The law is well settled that "[a] judge is presumed to be impartial until the contrary is proven; a substantial burden

is imposed on the [moving party] to challenge this presumption." 12 MOORE'S FEDERAL PRACTICE § 63.20[8][b] at 63-32.1 (3d ed. 2006). And that "substantial burden" is strongly reinforced here by the further delay and expense that reassignment would cause for this litigation and the onus and inefficiency it would impose on the new judge and the judicial system. *See, e.g., United States v. Robin*, 553 F.2d 8, 11 (2d Cir. 1977) (*en banc*); *Koller v. Richardson-Merrell Inc.*, 737 F.2d 1038, 1069 (D.C. Cir. 1984) (Richey, J., concurring), *vacated on other grounds*, 472 U.S. 424 (1985); *see also* Jack B. Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*, 120 F.R.D. 267 (1988).

The reassignment decision relies on the court of appeals' conclusion that the reversal of Judge Lamberth in eight appeals on a range of issues over a three-year period evinces an appearance of bias on his part. App., *infra,* 34a. The court's ruling rested on "the combination" (*id.* at 37a) of two considerations: statements made by Judge Lamberth in a single judicial opinion and the appellate reversals. Both of these factors were necessary to the court's decision; neither was sufficient by itself. Thus, the court made clear that it was "not decid[ing] whether such [statements], standing alone, require reassignment, for the [statements] do not stand alone . . . [but] follow an unbroken string of reversed district court orders." *Id.* at 34a. It was "[f]rom all of this evidence" (*id.* at 36a) that the court concluded that reassignment was warranted on the ground of an appearance of bias. Thus, the court's reassignment rises or falls on the propriety of its conclusion that the reversals supported the appearance of bias. The court's decision is both incorrect and conflicts with decisions of this Court and of other courts of appeals.[14]

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[14] Although petitioners respectfully disagree with the court's conclusion that "portions of the . . . opinion go further" than legitimate criticism (App., *infra,* 32a) and support recusal and reassignment on the ground of appearance of bias, it is unnecessary for this Court to address that issue in order to reverse the reassignment decision.

Judicial recusal and reassignment present matters of great difficulty and delicacy. Removal of a judge based on the substantive correctness of his rulings threatens to strike at the heart of the judicial independence that is crucial to the federal court system and the governmental structure of checks-and-balances and separated powers. Errors are grist for the appellate mill, and great care must be taken that they not be converted into grounds for attacks on individual judges or litigation strategy for a dissatisfied party to remove the case to a more favorable judge.[15]

These concerns are neither new nor hypothetical. This Court unanimously recognized them in *Liteky v. United States*, 510 U.S. 540, 555 (1994); *id.* at 558, 560 (Kennedy, J., concurring in the judgment). "In the wrong hands, a disqualification motion is a procedural weapon to harass opponents and delay proceedings." *United States v. Microsoft Corp.*, 253 F.3d 34, 108 (D.C. Cir.) (*en banc*), *cert. denied,* 534 U.S. 952 (2001). Worse yet, it can become a weapon for "judge shopping" and opens "a 'Pandora's box' for countless baseless attacks upon a defenseless judiciary whose independence is essential to the preservation of this republic." *Koller*, 737 F.2d at 1069 (Richey, J., concurring); *see also In re Corrugated Container Antitrust Case*, 752 F.2d 137, 145 & n.26 (5th Cir.) (citing Judge Richey's opinion), *cert. denied,* 473 U.S. 911 (1985). As then-Judge Breyer stressed:

> [T]he disqualification decision must reflect *not only* the need to secure public confidence through

[15] Recently, a committee appointed by the Chief Justice and chaired by Justice Breyer issued a report that discussed the propriety of a judicial misconduct complaint filed against Judge Lamberth in connection with his role in *Cobell*. The Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980*, (September 2006). The Report found that the dismissal of the complaint was appropriate, emphasizing that the "'rough and tumble' of litigation may require a strong hand to control strategic litigation behavior. Punishing this judicial conduct could inhibit other judges' efforts to apply the rule of law in an unruly case and thus encroach on the judicial independence needed to manage such litigation." *Id.* at 91.

> proceedings that appear impartial, *but also* the need to *prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic purposes, perhaps to obtain a judge more to their liking.*

In re Allied-Signal Inc., 891 F.2d 967, 970 (1st Cir. 1989) (third emphasis added), *cert. denied,* 495 U.S. 957 (1990). Finally, reassignment can "cause a waste of valuable judicial resources," especially in a "complex case" in which "the trial judge has become familiar with the facts and issues." *Koller*, 737 F.2d at 1069 (Richey, J., concurring).

The court of appeals, to its credit, was not unmindful of these considerations. App., *infra*, 30-32a. Unfortunately, however, the court's decision, although adverting to these concerns, did not in fact heed them. Because the ruling below is in error, is in conflict with *Liteky* and decisions in other circuits, and has grave consequences in removing a judge who has mastery of this complex case, this Court's review in this highly visible and important case is warranted.[16]

II. THE COURT OF APPEALS' REASSIGNMENT DECISION IS ERRONEOUS AND IN CONFLICT WITH *LITEKY* AND THE APPROACH FOLLOWED IN OTHER CIRCUITS.

As explained above, the court of appeals relied on the record of appellate reversals of Judge Lamberth in this litigation to support its holding that he be removed and the case reassigned on the ground that his impartiality might reasonably be questioned. The court never identifies evidence of bias in the decisions; rather the reversal of the decisions alone suffices. In several respects, this approach constitutes error in conflict with the precedents of this Court and other circuits that calls for this Court's intervention.

1. *Liteky* makes plain that a district judge's conduct in the

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[16] The panel's ruling already has been the subject of criticism. *See, e.g.*, Peter B. Rutledge, *A Judgment Call*, LEGAL TIMES, Aug. 7, 2006, at 58-59.

performance of his judicial function normally is not a basis for removal and reassignment on appearance grounds.

> [J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . [They] can only in the rarest circumstances evidence the degree of favoritism or antagonism required. . . . Almost invariably, they are proper grounds for appeal, not for recusal.

510 U.S. at 555. Justice Kennedy's concurrence is in accord, noting that "a high threshold is required" and that recusal "'was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise.'" *Id.* at 558, 560 (Kennedy, J., concurring) (quoting *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 44 (1913)).

These precedents are particularly applicable to reassignments that look to the substantive correctness of the district court's rulings. Such rulings – which are innumerable in any complicated and extended litigation and cover a diverse array of legal and discretionary judgments – are the very core of the judicial function. Indeed, as *Liteky* noted, they are "necessary to completion of the judge's task." 510 U.S. at 551. Furthermore, the legal system provides a specific remedy – appellate review – to correct such errors and thereby protect the complaining litigant's rights. In fact, inherent in *Liteky*'s recognition that challenged rulings "are proper grounds for appeal, not for recusal" (*id.* at 555) is the possibility that some rulings will turn out to be erroneous and therefore reversed on appeal. What is more, the Court expressly observed that "[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand" (*id.* at 551) – a situation that necessarily involves appellate reversal.[17]

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[17] Recently, an ABA commission proposed revisions to the Model Code of Judicial Conduct. Although ultimately retaining the concept of "appearance of impropriety," the commission identified this as an "important . . . question" and noted the concerns expressed against the

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Both before and after *Liteky*, courts of appeals have declined to order reassignment based on reversals of the district judge in the case. For example, the Seventh Circuit has held that "[b]ias cannot be inferred from a mere pattern of rulings by a judicial officer . . . erroneous as that [officer's] view [of the law] might be"; rather, reassignment "requires evidence that the [judicial] officer had it 'in' for the party for reasons unrelated to the officer's view of the law." *McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039, 1047 (7th Cir. 1989). Similarly, the Eighth Circuit has ruled that the issue on reassignment "is not whether the trial judge committed errors [as the court in fact held he did], but whether these errors create a reasonable inference that the Court has lost its impartiality." *Little Rock School Dist. v. Pulaski County Special School Dist.*, 839 F.2d 1296, 1302 (8th Cir.), *cert. denied*, 488 U.S. 869 (1988). In addition, following *Liteky*, the First Circuit recognized that the same principles apply "even when the judicial rulings in question are erroneous." *In re Boston's Children First*, 244 F.3d 164, 168 n.7 (1st Cir. 2001); *see also In re United* States, 441 F.3d 44, 67 (1st Cir.) (holding that *Liteky* "applies even to misjudgments"), *cert. denied,* 127 S.Ct 288 (2006). And the Ninth Circuit likewise has rejected the argument that a district judge's "error is itself evidence of bias," concluding that "[t]his argument does not support a recusal motion." *In re Focus Media, Inc.*, 378 F.3d 916, 930 (9th Cir. 2004), *cert. denied,* 544 U.S 968 (2005).[18]

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provision. Of particular relevance here, it observed that "a judge may on occasion make a good-faith error of fact or law" and that "[a]n error of this kind does not violate th[e] Rule" that a judge "shall perform all duties of judicial office fairly and impartially." Rather, it is only "intentional disregard of the law . . . [that] may constitute a violation of this Rule." *See* ABA, *Report of the Joint Commission to Evaluate the Model Code of Judicial Conduct* 4, 43 (Oct. 31, 2006).

[18] In *Liteky*, the Court approvingly quoted Judge Jerome Frank's opinion for the Second Circuit in *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2d Cir. 1943). *See* 510 U.S. at 551. As Judge Frank further observed:

> When upper court judges on appeal decide that the findings

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2. In addition, although the court purported to rely on the reversals as "' *evidence* of . . . bias or prejudice'" (App., *infra*, 34a (emphasis and omissions by the court)), it *never* explained how those reversals evidenced apparent bias or prejudice (rather than simply legal errors) on the part of Judge Lamberth. In fact, despite the importance of this case and the significance and sensitivity of the reassignment issue, the court gave surprisingly short shrift to this crucial point.

The crux of the court's discussion in this regard consists of a single paragraph. App., *infra*, 34a-35a. *Nowhere*, however, does the court relate its description of the prior decisions to its ultimate, and essential, conclusion that such reversals support a finding of apparent bias. Conversely, *nowhere* does the court exclude the possibility – a possibility that is presumed in the law (*see* pages 16-17, *supra*) – that Judge Lamberth made good-faith errors in rendering eight rulings out of countless decisions on disparate issues over the course of three years in this complex and vigorously contested litigation.

For example, the fact that Judge Lamberth "imposed an inappropriate evidentiary burden on Interior" (*id.*), while reversible error, is hardly a manifest indication of bias or prejudice. Likewise, that he "underestimated the harmful effects" of his subsequently reversed order (*id.*) scarcely seems to be the stuff of the extraordinary remedy of reassignment. So too, his difficulty in discerning the oft-elusive line between civil and criminal contempt constitutes no evidence of bias or prejudice; on the contrary, Judge Lamberth was held to have erroneously proceeded against respondents in *civil* contempt rather than, as a biased judge assumedly would have done, under the much more serious avenue of *criminal* contempt. *See also* page 26, *infra*.

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> of a trial judge are at fault because they – correctly or incorrectly – think those findings insufficiently supported by relevant and competent evidence, that appellate decision does not brand [the trial judge] as partial and unfair.

138 F.2d at 654.

In short, while the court professed to find, without explanation, that the cited reversals supported the required conclusion for reassignment that Judge Lamberth's "hostility to Interior has become 'so extreme as to display clear inability to render fair judgment'" (App., *infra*, 36a-37a), they show no such thing. Rather, at worst, the rulings are wholly consistent with the alternative explanation that Judge Lamberth committed reversible error in a good-faith effort to determine the law and apply it to the facts in a case as a conscientious jurist valiantly attempting to discharge the "difficult task"[19] of bringing in line "hopelessly inept"[20] and "recalcitran[t]"[21] Trustee-Delegates. At the very least, if substantive legal error is to be a ground supporting reassignment, it must provide clear and persuasive evidence of bias or prejudice rather than merely a mistake of law. *See, e.g., American Steel Barrel Co.*, 230 U.S. at 44 (recusal requires "not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice").

3. Finally, this Court's precedents governing recusal and reassignment require that a reasonable and objective observer, "'*knowing all the circumstances*,'" would conclude that the judge's impartiality might reasonably be questioned. *Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co.*, 535 U.S. 229, 232 (2002) (*per curiam*) (emphasis added by the Court) (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988)). Here, contrary to the court of appeals' decision, a reasonable and objective observer fully informed about the cited reversals of Judge Lamberth could not reasonably conclude that they establish his apparent bias or prejudice.

Some of the appeals in fact substantially affirmed Judge Lamberth. Others were decided on grounds that did not involve any error in his judicial actions at all. And still others reveal nothing more than a judge who was held to have made a relative

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[19] *Cobell XII*, 391 F.3d at 257.

[20] *Cobell XIII*, 392 F.3d at 463.

[21] *Cobell VI*, 240 F.3d at 1109.

handful of errors on discrete issues, out of more than 60 published rulings rendered in 10 years, in his good-faith effort to preside over this extraordinarily difficult and unprecedented case. Judge Lamberth simply is not, and does not reasonably appear to be, biased.

The court of appeals commenced its discussion with the contempt proceeding in *Cobell VIII*. However, that fundamentally, and unfairly, skews the analysis. To begin at the beginning, *Cobell VI* was the first appeal in this case and remains the seminal and controlling decision. And the watershed ruling in *Cobell VI* constitutes a resounding victory for petitioner-beneficiaries and a clear affirmation of the analysis of the district court. In addition to the specific principles of law recognized in that decision (*see* pages 7-9, *supra*), *Cobell VI* holds that: (1) Trustee-Delegates have substantial fiduciary trust duties to petitioner-beneficiaries; (2) those fiduciary duties are judicially enforceable; (3) Trustee-Delegates are and long have been in breach of their duties; and (4) the district court, sitting in equity, has broad remedial authority to redress those breaches and require Trustee-Delegates to comply with their trust obligations. *Cobell VI* thus first established, and – notwithstanding the court of appeals' subsequent opinions – establishes today, that petitioner-beneficiaries have been grievously wronged and are entitled to effective remedies. With respect to the ultimate disposition of this case, *Cobell VI* dwarfs any and all of the later rulings of the D.C. Circuit.

Moreover, even as to the actual "reversals," the court of appeals' reasoning is seriously flawed. *In re Kempthorne,* for example, did not involve any conduct of Judge Lamberth's at all. Instead, that mandamus proceeding in the court of appeals related entirely to actions of the Special Master, not of Judge Lamberth. *See* pages 13-14, *supra*. Although cited by the D.C. Circuit in its reassignment decision, the court nowhere explains how *Kempthorne* could lend any support to a determination of Judge Lamberth's apparent bias.

Cobell XII, also cited by the court of appeals as a reversal,

in fact affirmed Judge Lamberth on the law and represents another significant victory for petitioner-beneficiaries. As explained above (*see* page 11, *supra*), the court of appeals, based on *Cobell VI*, sustained all of Judge Lamberth's legal rulings – including the central one that he "possessed authority on remand from *Cobell VI* to issue a preliminary injunction regarding IT security" (391 F.3d at 256) – that related to the dispute in this case. Furthermore, the court criticized Trustee-Delegates for "ignor[ing]" *Cobell VI* and "mischaracteriz[ing]" the district court's injunction. *Id.* at 257, 258. To be sure, the court vacated and remanded the district court's judgment, but it did so solely on the "related procedural and evidentiary" grounds (*id.* at 258) that Judge Lamberth should have considered various declarations submitted by Trustee-Delegates that he thought were formally defective and conducted "an evidentiary hearing" (*id.* at 261) to resolve the contested issues on the basis of an updated record. While vacating the district court's order, *Cobell XII* hardly constitutes a stinging rebuke of Judge Lamberth, let alone any indication whatsoever of an appearance of bias.

The historical-accounting ruling in *Cobell XIII*, although again a technical reversal, also did not rest on any error committed by Judge Lamberth. Instead, the court of appeals reversed the historical-accounting provisions of the injunction in light of an intervening congressional statute that was enacted after Judge Lamberth had entered his decree. 392 F.3d at 465-66. No judicial error, and certainly no appearance of judicial bias, is demonstrated by this ruling.[22]

Still other appeals, while concededly more substantive reversals, equally do not support an appearance of bias. *Cobell*

[22] The other part of the injunction, relating to prospectively fixing the trust system, was reversed on more substantive grounds. *See Cobell XIII*, 392 F.3d at 469-78; page 13 note 13, *supra*. Even there, however, the court of appeals rejected Trustee-Delegates' broadest assertions of legal error, emphasizing that it was "puzzled" by the government's arguments and that the trust statutes, applied under this Court's precedents, "emphatically" contradicted those arguments and "compelled" their rejection. *Id.* at 470, 471.

VIII reversed a contempt judgment on the ground that it was criminal rather than civil in nature and that, because Judge Lamberth (as well as the parties) had believed it was civil, the stringent procedures required for criminal contempt had not been followed. However, such an error on this oft-recognized vexing and much-litigated issue of contempt law hardly signifies judicial bias.[23] On the contrary, it would be the imposition of the more draconian remedy of criminal contempt that presumably would be more likely to suggest the appearance that Judge Lamberth was "out to get" Trustee-Delegates.[24]

In these circumstances, the purported string of eight straight reversals, understood in context by a reasonable and fully informed observer, falls far short of demonstrating the appearance of judicial bias. These reversals do not depict a district judge deliberately bent on ignoring the applicable law in order to advantage one party or disadvantage the other. *See ABA Report* at 44 (canon of impartiality violated by "judges who deliberately or repeatedly disregard court orders or other clear requirements of law").

This is not to deny that Judge Lamberth has been reversed in other appeals on substantive legal grounds governing this

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[23] Courts have historically struggled to distinguish civil and criminal contempt. *See, e.g., Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 830 (1994) (distinction between civil and criminal contempt is "somewhat elusive"); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911) ("Contempts are neither wholly civil nor altogether criminal. And it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both") (internal quotations omitted).

[24] Furthermore, the court of appeals did not disagree with the basis in the record for the district court's order. As the district court found, Trustee-Delegates "cannot be trusted to report in a timely manner complete and accurate information regarding the status of trust reform and their efforts to discharge their fiduciary responsibilities properly." *Cobell V*, 226 F. Supp. 2d. at 159. The court of appeals likewise stated that Trustee-Delegates' "reports . . . were misleading about the progress being made in ways painstakingly detailed by the district court." *Cobell VIII*, 334 F.3d at 1149.

Indian Trust case. *See Cobell XVII; Cobell XVIII*; *Cobell XIX*. But that relative handful of reversals, out of more than 60 reported decisions he has made in this case on a wide range of issues over the course of 10 years, is nothing more than a reflection of the difficulty and complexity of this unprecedented litigation in which the government has been stubbornly recalcitrant in performing the most basic of its trust duties for more than a century, not of a judge who reasonably appears to be biased.

What is more, even these reversals must be viewed in their proper context. As the D.C. Circuit itself acknowledged in *Cobell XIX*, "some degree of confusion is understandable" over the proper meaning of the various appellate rulings in this case. 455 F.3d at 303. Indeed, the court recognized, with considerable understatement, that these precedents had used "different emphases depending on the issue before us." *Id.* In the end, the best the court could do to reconcile its precedents and provide guidance to the district court was to say that where two competing "bodies of law would lead us to different results, we must decide which of the two more appropriately governs the specific question at hand." *Id.* at 307; *see also id.* at 303-04 ("the specific question to be addressed determines which body of law becomes most prominent"). This lack of clarity and predictability of the rules of decision as determined by the appellate court strongly counsels against the equation of error by the district judge with apparent bias. *See ABA Report* at 44 (judges who "deliberately and repeatedly disregard ... *clear* requirements of law" could violate the cannon of impartiality) (emphasis added).[25]

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[25] There are numerous issues on which the court of appeals' decisions are in tension if not outright conflict. For example, in *Cobell VI*, the court held that "*Chevron* deference is not" applicable here and that Trustee-Delegates cannot "'escape [their] role as trustee by donning the mantle of administrators' to claim that courts must defer to [their] expertise and delegated authority." 240 F.3d at 1099. *See also Cobell XII*, 391 F.3d at 257. By contrast, in *Cobell XVII*, the court of appeals

(Cont'd)

At the end of the day, the cited reversals of Judge Lamberth simply do not show an appearance of judicial bias. Rather, they portray a conscientious but nonetheless possibly fallible district judge striving in good faith to adjudicate this demanding and novel – and critically important – lawsuit. In this situation, reassignment is not only wrong but both unfair to Judge Lamberth and a grave threat to a sound and independent judiciary.

(Cont'd)
concluded that the district court "owed substantial deference" to Trustee-Delegates because of their "subject-matter expertise" and reversed the lower court for not "deferring to Interior's judgment." 428 F.3d at 1076, 1077. *See also Cobell XIX*, 455 F.3d at 303. The district court's inability to harmonize these divergent statements, and indeed to anticipate accurately each time which approach the court of appeals would ultimately adopt in a given circumstance (*e.g., Cobell XVII* and *Cobell XIX* or *Cobell VI* and *Cobell XII*) is hardly the trial judge's fault and surely is not evidence of apparent bias.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED JULY 11, 2006

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 11, 2006 Decided July 11, 2006

No. 05-5269

ELOUISE PEPION COBELL, *et al.*,

Appellees

v.

DIRK KEMPTHORNE, Secretary of the Interior, *et al.*,

Appellants.

Before: TATEL and BROWN, Circuit Judges, and SILBERMAN, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, *Circuit Judge*: For the ninth time in six years we consider an appeal in this longstanding dispute between beneficiaries of Indian land trusts and their trustee, the United States. In this most recent iteration, the government challenges a district court order requiring that every mailing to trust beneficiaries include a notice stating that "any" information provided about trust matters "may be unreliable." The government also asks us to assign the case to a different

district judge. Because we agree with the government that the order exceeded the district court's authority, we vacate and remand for further proceedings. And for the reasons given in this opinion, we instruct the chief judge of the district court to reassign the case.

I.

In the latter part of the nineteenth century, the United States took title to Indian lands as trustee for individual Indians, thereby assuming a fiduciary obligation to hundreds of thousands of Indians. We described the history of the government's trust obligations, now delegated to the Secretaries of Interior and Treasury, in *Cobell v. Norton*, 240 F.3d 1081, 1086-92 (D.C.Cir.2001) ("*Cobell VI*").

Ten years ago, five Indians-we shall refer to them as "plaintiff-beneficiaries"-filed a complaint in the U.S. District Court for the District of Columbia on behalf of themselves and all other trust beneficiaries alleging the federal government had breached its fiduciary obligations. Plaintiff-beneficiaries claimed, among other things, that the government destroyed critical records, failed to account to trust beneficiaries, and either lost trust assets or converted them to government use. Plaintiff-beneficiaries requested declaratory and injunctive relief against Interior and Treasury officials "to force the government to abide by its duty to render an accurate accounting" of the assets held in Individual Indian Money (IIM) trust accounts. *Cobell v. Babbitt*, 91 F.Supp.2d 1, 6-7 (D.D.C.1999) ("*Cobell V*"). After certifying the case as a class action and conducting "a lengthy trial, the district court concluded that the federal government and its

officers have been derelict in their duties." *Cobell VI*, 240 F.3d at 1086. Accordingly, the court "ordered them to come into compliance with their duties," and remanded the case to Interior and Treasury. *Id.* at 1094. The district court nonetheless "retained continuing jurisdiction over the case for the next five years" and required "quarterly status reports summarizing the government's progress." *Id.*

In *Cobell VI*, although we "generally affirm[ed]," we "order[ed] the district court to modify the characterization of some of its findings." *Id.* at 1086. We recognized that "[t]he trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long." *Id.* Although "[t]he level of oversight proposed by the district court may well be in excess of that countenanced in the typical delay case," we observed, "so too is the magnitude of government malfeasance and potential prejudice to the plaintiffs' class." *Id.* at 1109. We approved the district court's plan "to wait until a proper accounting can be performed" and then to "assess [the government's] compliance with [its] fiduciary obligations." *Id.* at 1110. Still, we made clear that we "expect[ed] the district court to be mindful of the limits of its jurisdiction" and therefore to refrain from unduly interfering with Interior's "conduct in preparing an accounting." *Id.*

Since *Cobell VI*, we have resolved six more appeals, plus two more today. These appeals address not only the core issue of how the accounting should be conducted, but also various collateral matters ranging from contempt citations against senior Interior officials to orders requiring the Department to disconnect its computer systems from the internet.

See Cobell v. Kempthorne, No. 05-5388, 455 F.3d 301, 2006 WL 1889148 (D.C.Cir. July 11, 2006) (computer disconnection); *In re Kempthorne*, 449 F.3d 1265 (D.C.Cir.2006) (recusal of Special Master); *Cobell v. Norton*, 428 F.3d 1070 (D.C.Cir.2005) ("*Cobell XVII*") (accounting); *Cobell v. Norton*, 392 F.3d 461 (D.C.Cir.2004) ("*Cobell XIII*") (accounting); *Cobell v. Norton*, 391 F.3d 251 (D.C.Cir.2004) ("*Cobell XII*") (computer disconnection); *In re Brooks*, 383 F.3d 1036 (D.C.Cir.2004) (recusal of Special Master); *Cobell v. Norton*, 334 F.3d 1128 (D.C.Cir.2003) ("*Cobell VIII*") (contempt citations).

This appeal involves yet another collateral issue, which arose when plaintiff-beneficiaries sought to require Interior to include in every written communication with Indian trust beneficiaries a notice stating that "[t]he Trustee-Delegates have admitted that they do not know whether the information that they are providing to you about your Trust assets is accurate and complete" and that "the government is currently unable to provide all individual Indian trust beneficiaries an accurate and complete accounting of their trust assets and is unable to provide a timetable for when that accounting will be rendered." *Cobell v. Norton*, 229 F.R.D. 5, 19-20 (D.D.C.2005) ("*Cobell XV*") (quoting Pls.' Proposed Order). According to plaintiff-beneficiaries, the district court had authority to issue such an order either under Federal Rule of Civil Procedure 23(d) or pursuant to the court's inherent equitable powers. The government opposed the motion. On July 12, 2005, the district court, without holding a hearing, granted the motion but altered the proposed text. In its order—we shall refer to it as the "July 12 order"—the district

court required Interior to include the following notice in all written communications to trust beneficiaries:

> Evidence introduced in the *Cobell* case shows that *any* information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets that current and former IIM Trust account holders receive from the Department of the Interior may be *unreliable*. Current and former IIM Trust account holders should keep in mind the questionable reliability of IIM Trust information received from the Department of the Interior if and when they use such information to make decisions affecting their IIM Trust assets.

Id. at 21-22. Reasoning that even communications that on their face bear no relation to trust accounts "might influence an Indian beneficiary's trust-related decisions," the district court directed Interior to include the notice in all written communications with beneficiaries "without regard to subject matter." *Id.* at 17. In granting the motion, the district court relied on Rule 23, emphasizing that the order "flow[ed] from the fact that this case is a class action rather than from the Court's equitable powers." *See id.* at 15 n. 7.

The government now appeals, asking that we vacate the July 12 order as unauthorized by Rule 23. On the government's motion, we stayed the July 12 order pending appeal. *Cobell v. Norton*, No. 05-5269 (D.C.Cir. Sept. 2, 2005). Also, relying on language in the July 12 opinion and a series of district court rulings reversed by this court, the government moved to have the case assigned to a different

judge. We consolidated that motion with this appeal. *Cobell v. Norton*, No. 05-5068 (D.C.Cir. Sept. 15, 2005).

II.

We begin with the July 12 Rule 23(d) order. Before addressing the government's challenge, however, we must consider plaintiff-beneficiaries' argument that we lack jurisdiction because, according to them, the order is not immediately appealable. The government contends that we do have jurisdiction to review the July 12 order either because it is an appealable injunction or pursuant to the collateral order doctrine. *See* 28 U.S.C. § 1292(a)(1) (making injunctions immediately appealable); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (laying out collateral order doctrine). Alternatively, the government urges us to treat its appeal as a petition for a writ of mandamus. Because we agree that the order qualifies as an injunction, we need not address the government's other two arguments.

Under 28 U.S.C. § 1292(a)(1), circuit courts have jurisdiction to review "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions." Regardless of how the district court may choose to characterize its order, section 1292(a)(1) applies to any order that has "the practical effect of granting or denying an injunction," so long as it also "might have a serious, perhaps irreparable, consequence, and . . . can be effectually challenged only by immediate appeal." *I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Indus., Inc.*, 789 F.2d 21, 23-24 (D.C.Cir.1986) (internal quotation marks omitted). As

both parties agree, to have "the practical effect of granting or denying an injunction" an order must be "directed to a party" and "enforceable by contempt." *Id.* at 24 (internal quotation marks omitted). Quoting from Wright and Miller, plaintiff-beneficiaries argue that to qualify as an injunction an order must meet a third requirement: it "must provide 'some or all of the substantive relief sought by a complaint in more than temporary fashion.'" Appellees' Br. 9 (quoting 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3922 (2d ed. 1996)) (Wright's internal quotation marks and footnote omitted). But plaintiff-beneficiaries omit two key words-words that, as we shall see, control this case. The treatise, like our precedent, actually says that the definition of "injunction" includes orders "designed to accord *or protect* some or all of the substantive relief sought by a complaint in more than temporary fashion." 16 Wright, Miller & Cooper, *supra*, § 3922 (emphasis added) (internal quotation marks and footnote omitted); *I.A.M. Nat'l Pension Fund*, 789 F.2d at 24 (same language).

As noted above, it makes no difference that the district court said the July 12 order "flow[ed] from the fact that this case is a class action rather than from the Court's equitable powers," *Cobell XV*, 229 F.R.D. at 15 n. 7. *See Lightfoot v. District of Columbia*, 448 F.3d 392, 394 (D.C.Cir.2006) (per curiam) ("Although appellees reiterate the district court's contention that it did not grant an injunction, we rather easily conclude that the district court's . . . order was just that."). The only question is whether the order has "the practical effect of granting or denying an injunction." *Supra* p. 321. Put another way, if the July 12 order looks like an injunction

and acts like an injunction, it's an injunction-at least for jurisdictional purposes.

To qualify as an injunction, then, an order must (1) be "directed to a party"; (2) be "enforceable by contempt"; (3) be "designed to accord or protect" substantive relief; and (4) threaten "a serious, perhaps irreparable, consequence" and be challengeable "only by immediate appeal." *I.A.M. Nat'l Pension Fund*, 789 F.2d at 24 (internal quotation marks omitted). The parties agree that the July 12 order satisfies the first two requirements: it is directed to a party-the Interior Secretary-and is enforceable by contempt. The parties have very different views as to whether the order satisfies the third requirement: that it accord or protect substantive relief. Plaintiff-beneficiaries see the order as merely procedural, characterizing it as a "class-action case-management order designed to provide a fair proceeding that preserves the opportunity for effective judicial relief in the future." Appellees' Br. 10. According to the government, "[t]he order does not govern the conduct of the litigation; it is a substantive order that aims to affect the primary conduct of the class." Appellants' Br. 46.

We agree with the government. Unlike a case-management order, which would merely advance the litigation procedurally, the July 12 order seeks to protect substantive rights during the pendency of the litigation. The district court expressly meant for the order to help class members make intelligent decisions about trust assets, not to facilitate their participation in the litigation: "The court-ordered accounting is designed to promote class members' rights to make fully informed choices about their trust assets.

If there are no more informed decisions to be made, or if all the trust assets are gone, then the court-ordered accounting will be useless to the Indians." *Cobell XV*, 229 F.R.D. at 16. Plaintiff-beneficiaries themselves describe the July 12 order as "serv[ing] to protect *pendente lite* Plaintiff-Beneficiaries' interest in the trust accounts that are the subject of the litigation and thus to ensure that the ultimate relief is not nugatory or ineffective as to at least some of the members of the class." Appellees' Br. 10 n. 10. Protecting beneficiary rights represents classic injunctive relief. *See Dist. 50, United Mine Workers of Am. v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C.Cir.1969) ("The usual role of a preliminary injunction is to preserve the status quo pending the outcome of litigation.").

We also agree with the government that the July 12 order satisfies the final requirement, as it threatens "a serious, perhaps irreparable, consequence" and "can be effectually challenged only by immediate appeal." *I.A.M. Nat'l Pension Fund*, 789 F.2d at 24 (internal quotation marks omitted). The order requires a cabinet agency to confess its own unreliability not just in mailings relating to trust accounts, but in every mailing on any subject. *See Cobell XV*, 229 F.R.D. at 17 (requiring notice in all mailings "without regard to subject matter"). This strikes us as both serious and, if unjustified, not correctable at the end of the litigation.

Having confirmed our jurisdiction, we next consider plaintiff-beneficiaries' argument that the government has forfeited its challenge to the district court's authority to issue the July 12 order by failing to raise the argument in the district court. *See Flynn v. Comm'r*, 269 F.3d 1064, 1068-69

(D.C.Cir.2001) ("Generally, an argument not made in the lower tribunal is deemed forfeited and will not be entertained absent exceptional circumstances." (internal quotation marks omitted)). According to plaintiff-beneficiaries, "the district court determined" that "'Interior has previously conceded and does not now dispute' the court's authority to enter the July 12 order pursuant to Rule 23(d)." Appellees' Br. 15 (quoting *Cobell XV*, 229 F.R.D. at 13). The district court determined no such thing. The court actually said: "Interior has previously conceded and does not now dispute this Court's authority to restrict Interior's communications with Indian beneficiaries pursuant to Rule 23(d)." *Cobell XV*, 229 F.R.D. at 13. The difference is critical. Although, as the district court pointed out, the government never challenged the court's authority to issue communications-related orders *in general*, the government nowhere conceded that the district court had authority to enter *the July 12 order*. Far from it. The government expressly objected to the contents of the order: "any notice," the government argued, "should only inform class members of the existence of this litigation, of their potential class membership, and of their right to consult with class counsel." Defs.' Opp'n to Pls.' Mot. 7 (internal quotation marks omitted). Because the government has preserved its challenge to the July 12 order, we turn to the merits.

III.

Although the July 12 order has the effect of an injunction, the district court relied on authority drawn from Rule 23(d), not on its equitable authority. *See supra* p. 320. In particular, the court cited Rule 23(d)(3), which authorizes district courts

to issue orders "imposing conditions on the representative parties or on intervenors." Fed.R.Civ.P. 23(d)(3); *see Cobell XV*, 229 F.R.D. at 13 (relying on this language). But nothing in Rule 23(d)(3) supports the July 12 order. That order imposed a condition not on a representative party or an intervenor, but on the defendant. Hardly a technicality, the limitation to representative parties and intervenors stems from Rule 23(d)(3)'s purpose: ensuring proper representation of class interests. *See* Fed.R.Civ.P. 23 advisory committee's note (1966 amendment) ("Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action." (citation omitted)). The July 12 order had an entirely different purpose-to help protect trust beneficiaries from making poor decisions based on faulty information unrelated to the litigation itself.

Instead of defending the district court's flawed reliance on Rule 23(d)(3), plaintiff-beneficiaries argue that the district court had authority to issue the July 12 order under Rule 23(d)(2), which, although the district court nowhere cited it, authorizes orders

> requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation

> fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

Fed.R.Civ.P. 23(d)(2). According to plaintiff-beneficiaries, the July 12 order fits within the rule's authorization of notice "*for the protection of the members of the class* or otherwise for the fair conduct of the action." Appellees' Br. 17 (quoting Fed.R.Civ.P. 23(d)(2)) (appellees' emphasis). Not until later in their brief, however, do plaintiff-beneficiaries quote Rule 23(d)(2)'s second half, which makes clear that the rule contemplates not substantive relief of the kind the court granted here, *see supra* p. 322, but only notice of procedural matters—such as "any step in the action, . . . the proposed extent of the judgment," and "the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action," Fed.R.Civ.P. 23(d)(2). Rule 23's advisory committee notes, though describing the rule's list of permissible subjects for notice as "non-exhaustive," nowhere suggest that the rule authorizes substantive, as opposed to procedural, notice. Fed.R.Civ.P. 23 advisory committee's note (1966 amendment); *see also* Fed.R.Civ.P. 23(d)(5) (authorizing orders "dealing with similar procedural matters").

None of the four cases plaintiff-beneficiaries cite supports the proposition that Rule 23(d)(2) authorizes substantive relief. Indeed, each case, even including one in which a Rule 23(d) order was reversed, concerns communications relating to the litigation's procedural posture, not its underlying merits. In *In re School Asbestos Litigation*, 842 F.2d 671, 676 (3d Cir.1988), upon which

plaintiff-beneficiaries rely most heavily, the Third Circuit affirmed a notice that "identifie[d] the member companies of the SBA, note[d] that those member companies 'principally fund' the SBA, state[d] that those companies [were] defendants in the underlying class action and that all public and private, elementary and secondary schools [were] plaintiffs in the litigation," and provided "the names, addresses and telephone numbers of lead counsel for the plaintiff class"-all procedural information. So too in *Great Rivers Cooperative of Southeastern Iowa v. Farmland Industries, Inc.*, 59 F.3d 764, 765 (8th Cir.1995), where the Eighth Circuit reversed an order requiring defendants to print in a newsletter a rebuttal to an article that "as a whole appear[ed] to constitute an implied solicitation to potential class members to opt out of this litigation if and when a class is certified and notice given" and "to refrain from communicating anything in the future that could reasonably be taken as an invitation to opt out." Likewise, in *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1236 (9th Cir.1999), the Ninth Circuit affirmed an order requiring "the government to provide notice of the pending action and the injunction" the district court had issued, and in *In re Synthroid Marketing Litigation*, 197 F.R.D. 607, 610 (N.D.Ill.2000), the district court ordered notice "sent to the class members . . . providing them with correct information about what they need to do if they wish to either participate in, object to or opt out of the proposed settlement." Four cases, four procedural notices.

As these cases demonstrate, Rule 23(d)(2) authorizes notice to protect class members' right to participate in the litigation; it does not authorize substantive orders protecting the very rights class members seek to vindicate. To keep class

members informed of this litigation, the district court here could have simply ordered notice of the pendency of the litigation, the rulings it had already issued, and beneficiaries' right to contact class counsel-exactly the type of order the government recommended, *see* Defs.' Opp'n to Pls.' Mot. 7; *supra* p. 323.

But the district court went much further. Rather than merely informing class members of the litigation's progress or of facts already established, the district court required Interior to attest to facts it disputed. To make matters worse, the notice's broad indictment of Interior's reliability, accentuated by the emphasis on the word "any," extends well beyond trust account information: "*any* information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets that current and former IIM Trust account holders receive from the Department of the Interior may be *unreliable*." *Cobell XV*, 229 F.R.D. at 21-22. To be sure, we have no doubt Interior's trust account information has serious reliability problems. *See, e.g.*, *Cobell VI*, 240 F.3d at 1089 ("Not only does the Interior Department not know the proper number of accounts, it does not know the proper balances for each IIM account, nor does Interior have sufficient records to determine the value of IIM accounts."). But nothing in the record reveals any problems with other information such as land appraisals. The district court thought that Interior's "more complicated calculations, such as land appraisals" could not "be trusted" given deficiencies in the trust accounts, *Cobell XV*, 229 F.R.D. at 16, but it pointed to nothing in the record indicating that trust account problems might infect Interior's calculations in other areas.

Exacerbating the notice's overbreadth is its wide distribution. Noting that trust information could affect all decisions by trust beneficiaries, the district court ordered Interior to send the notice with every written communication. *Id.* at 17 n. 10. The notice's inclusion in mailings unrelated to trust accounts (such as those regarding health care or education), especially given the notice's sweeping language, suggests that any Interior mailing "may be *unreliable*"—a conclusion both unsupported by the record and likely quite harmful to the Department and its programs. Because the July 12 order seeks to protect substantive rights and inflicts substantive harm on Interior, it falls outside Rule 23(d)(2)'s scope.

IV.

This brings us to the government's motion to assign the case to a different judge. In support, the government cites two types of evidence: language from the opinion accompanying the July 12 order and "[r]epeated reversals" of district court rulings. Appellants' Br. 55.

The July 12 Opinion

Because the government relies so heavily on the district court's language, and because it is important to read that language in context, we quote at length. The opinion's "Background" section begins:

> At times, it seems that the parties, particularly Interior, lose sight of what this case is really about. The case is nearly a decade old, the docket sheet

contains over 3000 entries, and the issues are such that the parties are engaged in perpetual, heated litigation on several fronts simultaneously. But when one strips away the convoluted statutes, the technical legal complexities, the elaborate collateral proceedings, and the layers upon layers of interrelated orders and opinions from this Court and the Court of Appeals, what remains is the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal.

For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people.

Appendix A

The Indians who brought this case are beneficiaries of a land trust created and maintained by the government. The Departments of the Interior and Treasury, as the government's Trustee-Delegates, were entrusted more than a century ago with both stewardship of the lands placed in trust and management and distribution of the revenue generated from those lands for the benefit of the Indians. Of course, it is unlikely that those who concocted the idea of this trust had the Indians' best interests at heart-after all, the original General Allotment Act that created the trust was passed in 1887, at a time when the government was engaged in an "effort to eradicate Indian culture" that was fueled, in part, "by a greed for the land holdings of the tribes[.]" *Cobell v. Babbitt* ("*Cobell V*"), 91 F.Supp.2d 1, 7-8 (D.D.C.1999). But regardless of the motivations of the originators of the trust, one would expect, or at least hope, that the modern Interior department and its modern administrators would manage it in a way that reflects our modern understandings of how the government should treat people. Alas, our "modern" Interior department has time and again demonstrated that it is a dinosaur-the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.

Cobell XV, 229 F.R.D. at 7 (alteration in original). The district court next outlined the "Factual History," first asserting that

Appendix A

"Interior's management of the Indian trust has been a nightmare from the beginning," *id.*, and then briefly chronicling Interior's trust management failings, which have been well-documented both in this litigation and elsewhere, *id.* at 8; *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R.Rep. No. 102-449 (1992). Finding that "[t]he ignominious record speaks for itself," *Cobell XV*, 229 F.R.D. at 8, the court recited many of its previous findings of mismanagement. "The problems that result from Interior's inability to maintain complete and accurate records of the IIM trust," the court continued, "are compounded and made more intractable by the penchant of Interior's employees, officials, and litigation counsel to be less than forthcoming with the Court." *Id.* at 9. In support of this statement, the court noted that it had on several occasions cited officials for contempt or referred government attorneys to the Committee on Grievances. *Id.*

"Add vindictiveness to dishonesty and managerial ineptitude," the court went on, giving as the primary example of "vindictiveness" Interior's alleged violation of the court's order forbidding retaliation against Interior officials who cooperated with plaintiff-beneficiaries. *Id.* at 9-10. According to the district court, Interior violated that order by taking "severe adverse employment actions" against an Interior official, Mona Infield, who had provided an affidavit to assist plaintiff-beneficiaries. *See id.* at 10. Although "the matter was later settled to the Court's satisfaction," the court found it "illustrative enough of the depths to which Interior has sunk that the Court found it necessary to issue a general anti-retaliation order in the first place; but Interior's subsequent willful retaliation against its own employee in the face of such an order betrays a truly Machiavellian guile." *Id.*

"As if the Infield business was not enough," the court continued, "Interior's wrath was turned on the Indian beneficiaries themselves in the wake of the Court's September 29, 2004 order restricting communications between Interior and class members concerning sales of Indian trust land (the 'land-sales order')." *Id.* "'[B]etween October 1, 2004 and October 8, 2004,'" the court explained, "'a number of individual Indian trust beneficiaries were denied either their trust checks or information regarding their trust checks by BIA employees who cited this Court's [land-sales] Order as justification,'" even though "the Court had previously made clear at a hearing held on October 1, 2004, that the land-sales order had no effect whatsoever on Interior's ability to distribute trust checks." *Id.* (quoting *Cobell v. Norton*, 355 F.Supp.2d 531, 542 (D.D.C.2005)) (alteration in original). "Apparently," according to the court, "Interior's withholding of trust checks or information about trust checks from the Indians was one outward manifestation of a period of Byzantine maneuvering within the department in an attempt to either evade or, failing that, mischaracterize and vilify this Court and the land-sales order." *Id.* at 11. "In light of the record in this case," the court found it "more likely that the Secretary's actions constituted willful misconduct" than that she was "grossly negligent." *Id.* (internal quotation marks omitted).

The court's "Factual History" concludes:

> But these are only examples. The entire record in this case tells the dreary story of Interior's degenerate tenure as Trustee-Delegate for the Indian trust-a story shot through with bureaucratic

> blunders, flubs, goofs and foul-ups, and peppered with scandals, deception, dirty tricks and outright villainy-the end of which is nowhere in sight. Despite the breadth and clarity of this record, Interior continues to litigate and relitigate, in excruciating fashion, every minor, technical legal issue. This is yet another factor forestalling the final resolution of the issues in this case and delaying the relief the Indians so desperately need. It is against this background of mismanagement, falsification, spite, and obstinate litigiousness that this Court is to evaluate the general reliability of the information Interior distributes to IIM account holders.

Id. (citation omitted).

After recounting the "Procedural History," the court began its "Discussion," *see id.* at 11-12, dropping the following footnote:

> Interior's tongue-in-cheek summary of its responses to the plaintiffs' motion-"The Proposed Notice is the wrong notice at the wrong time to the wrong group of recipients paid for, and sent out by, the wrong party [,]" Defs.' Opp. at 2-typifies the level of respect that Interior generally accords both the Indian beneficiaries and this Court. The puerile reference is not lost on the Court, but Interior's misguided attempt at levity in the context of litigating an issue of immense importance to 500,000 members of a historically

> oppressed people is disgraceful. Unfortunately, it is also unsurprising from a defendant that this Court has charged with "setting the gold standard for arrogance in litigation strategy and tactics." [*Cobell v. Norton*, 357 F.Supp.2d 298, 307 (D.D.C.2005).] This Court has played host to countless pleadings from clinically insane litigants and prison inmates but has rarely seen such a disrespectful tenor in a court filing.

Id. at 13 n. 5 (first alteration in original).

Turning to the merits, the district court stated:

> Interior does not dispute the factual predicates of the plaintiffs' argument. Interior concedes that all trust-related information Interior communicates to Indian beneficiaries is inherently unreliable. Of course, anything other than a concession of this point would be laughable in light of the record in this case. The factual record, composed of the accumulated detritus of nine years spent examining Interior's odious performance as Trustee-Delegate for the Indian trust, is certainly clear enough and smattered with a sufficient number of specific abuses to satisfy the ... standard for relief under Rule 23(d). If Interior cannot even ascertain the number of existing IIM account holders, how can any of its more complicated calculations, such as land appraisals, be trusted? If Interior is willing to deceive this Court, why would anyone think that

Interior would hesitate to lie to the Indians?

Id. at 16. After resolving several matters not at issue here, the court concluded:

> While it is undeniable that Interior has failed as a Trustee-Delegate, it is nevertheless difficult to conjure plausible hypotheses to explain Interior's default. Perhaps Interior's past and present leaders have been evil people, deriving their pleasure from inflicting harm on society's most vulnerable. Interior may be consistently populated with apathetic people who just cannot muster the necessary energy or emotion to avoid complicity in the Department's grossly negligent administration of the Indian trust. Or maybe Interior's officials are cowardly people who dodge their responsibilities out of a childish fear of the magnitude of effort involved in reforming a degenerate system. Perhaps Interior as an institution is so badly broken that even the most well-intentioned initiatives are polluted and warped by the processes of implementation.[15] The

15. This hypothesis may be the most plausible, as there is some evidence to substantiate it. In June, 2002, Interior filed with the Court a report generated by Interior's Office of Inspector General ("OIG") following an investigation of "seven specific issues relating to allegations that senior managers and attorneys of the Department of the Interior ··· engaged in misconduct." *See* Notice [1355] of Filing the Office of Inspector General's Report: Allegations Concerning Conduct of Department of the Interior Employees Involved in Various

(Cont'd)

government as a whole may be inherently incapable of serving as an adequate fiduciary because of some structural flaw. Perhaps the Indians were doomed the moment the first European set foot on American soil. Who can say? It may be that the opacity of the cause renders the Indian trust problem insoluble.

On numerous occasions over the last nine years, the Court has wanted to simply wash its hands of Interior and its iniquities once and for all. The plaintiffs have invited the Court to declare that Interior has repudiated the Indian trust,

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(Cont'd)

Aspects of the Cobell Litigation ("OIG Rep."), June 25, 2002, exec. summ. at 1. This investigation was conducted during the pendency of the 2002 contempt trial mentioned above. In the course of investigating Interior, the OIG "uncovered bad judgment, unfocused management, a myriad of definitional issues, and extreme hostility among the players and entities[,]" and "found factions with extremely myopic views of and approaches to the very complex issues at hand." OIG Rep., exec. summ. at 2. The OIG noted that in its decades of oversight of Interior, "we have often observed . . . a Department whose components are blinded by clouded judgment and crippled by distrust [,]" *id.* at 6, characterized by a "bunker mentality" in which Interior employees generally "begin by protecting [their] own Bureau or office, to the detriment of other Bureaus or offices if necessary; then protect the Department, and/or the institution or position it has advanced; [and] finally, protect the public interests. . . ." *Id.* The OIG found that while Interior's various entities and employees are "fueled by a multitude of motivations, many of which were well-intentioned[,]" *id.* at 2, one of the least prevalent motivations "was to protect and advance the interests of Individual Indian Trust account holders." *Id.*

appoint a receiver to liquidate the trust assets, and finally relieve the Indians of the heavy yoke of government stewardship. The Court may eventually do all these things-but not yet. Giving up on rehabilitating Interior would signal more than the downfall of a single administrative agency. It would constitute an announcement that negligence and incompetence in government are beyond judicial remedy, that bureaucratic recalcitrance has outpaced and rendered obsolete our vaunted system of checks and balances, and that people are simply at the mercy of governmental whim with no chance for salvation. The Court clings to a slim and quickly receding hope that future progress may vitiate the need for such a grim declaration.

This hope is sustained in part by the fact that the Indians who brought this case found it in themselves to stand up, draw a line in the sand, and tell the government: Enough is enough-this far and no further. Perhaps they regret having done so now, nine years later, beset on all sides by the costs of protracted litigation and the possibility that their efforts may ultimately prove futile; but still they continue. The notice requirement established by the Court today represents a significant victory for the plaintiffs. For the first time in the history of this case, the majority of Indian beneficiaries will be aware of the lawsuit, the plaintiffs' efforts, and the danger involved in placing any further confidence in the Department

> of the Interior. Perhaps more importantly, the Indians will be advised that they may contact class counsel for guidance on their trust-related concerns. This likely will bring to light a wealth of new evidence concerning Interior's mismanagement of the trust; it will also open an avenue to relief for individuals throughout Indian country whose suffering might otherwise be buried forever in a bureaucratic tomb.
>
> Real justice for these Indians may still lie in the distant future; it may never come at all. This reality makes a statement about our society and our form of government that we should be unwilling to let stand. But perhaps the best that can be hoped for is that people never forget what the plaintiffs have done here, and that other marginalized people will learn about this case and follow the Indians' example.

Id. at 22-23 & n. 15 (omissions and alterations in original).

Reversals

Since *Cobell VI*, this court has heard eight appeals in this case, each time setting aside a district court order or other action against Interior. According to the government, this pattern provides further evidence of the need to assign the case to a different judge.

In the first of these eight opinions, *Cobell VIII*, we reversed contempt citations against the Secretary and

Assistant Secretary of Interior, finding the district court's reasoning on one point "mystifying." *Cobell VIII*, 334 F.3d at 1149. We also issued a writ of mandamus directing the removal of a "Special Master-Monitor" whom the district court had appointed over the government's objection. *Id.* at 1135-36, 1142. Among other things, we found the district court had given the Monitor "an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." *Id.* at 1142.

In the second opinion, *In re Brooks*, we issued another writ of mandamus, this time directing the district court to disregard reports from a Special Master who "had been performing investigative and adjudicative tasks that entailed *ex parte* communications with witnesses and third parties." *In re Brooks*, 383 F.3d at 1044. We found "the nature and extent of [the Special Master's] *ex parte* contacts would lead an informed observer reasonably to question his impartiality." *Id.* at 1046. The district court's action, we explained, was as if "a judge presiding over a criminal proceeding" had "dispatch[ed] his law clerk to visit the scene of the crime, take fingerprints, interview witnesses, and report back to the judge about his findings." *Id.*

In *Cobell XII*, we vacated an order requiring "disconnection of substantially all of the Department of the Interior's computer systems from the Internet." *Cobell XII*, 391 F.3d at 253. We found the district court had impermissibly "shift[ed] the burden of persuasion to the Secretary to show why disconnecting most of Interior's IT systems was unnecessary," *id.* at 259, and "abused its discretion by not holding an evidentiary hearing before issuing the ... injunction," *id.* at 262.

Appendix A

In *Cobell XIII*, we largely vacated a "historical accounting" injunction requiring Interior to create a plan for fulfulling its fiduciary obligations and "identify any portions of the plan that might be deemed inconsistent with the common law trust duties previously identified by the district court, and explain why the identified portion or portions should not be considered inconsistent with these duties." *Cobell XIII*, 392 F.3d at 469. We explained that "the court's innovation of requiring defendants to file a plan and then to say what 'might' be wrong with it turns the litigation process on its head," *id.* at 474, and that "the court may not micromanage court-ordered reform efforts undertaken to comply with general trust duties enumerated by the court, and then subject defendants to findings of contempt for failure to implement such reforms," *id.* at 478.

In *Cobell XVII*, we set aside another historical accounting injunction, noting that "[e]ven the plaintiffs agree[d] that the injunction should not stand because they believe[d] it to be impossible to perform." *Cobell XVII*, 428 F.3d at 1072. The district court had "completely disregarded relevant information about the costs of its injunction," *id.* at 1077, and, in rejecting the government's plan to use statistical sampling, "acknowledged the extra burden in time and money but saw that singular burden as outweighed simply by the beneficiaries' preferences." *Id.* at 1078.

In *In re Kempthorne*, we issued yet another writ of mandamus, this time ordering the district court to strike several Special Master reports from the record. Charged with investigating a contractor's allegation that, among other things, Interior had withheld critical information from the

court, the Special Master hired an employee of that very contractor-indeed, an employee who would "likely be a witness in [the contractor's] case against the Department." *In re Kempthorne*, 449 F.3d 1265, 1267. We thought it "difficult to imagine a more biased way of conducting and reporting upon an investigation." *Id.*

Today, we set aside two more orders against Interior. In No. 05-5388, we again vacate an order requiring disconnection of virtually all Interior computers from the internet, finding that "the district court glossed over the immensity of the disruption that would occur to Interior's operations." *Cobell v. Kempthorne*, No. 05-5388, slip op. at 28, 2006 WL 1889148, 455 F.3d at 316. And in this appeal, we set aside an order requiring Interior to confess its own unreliability in every mailing to trust beneficiaries on any subject. As we explained above, the district court again undervalued the potential harm to Interior, and then exacerbated that harm by requiring notice more sweeping than the record can support. *See supra* p. 325.

V.

We have authority to assign a case to a different district judge under "our general supervisory power to 'require such further proceedings to be had as may be just under the circumstances.'" *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C.Cir.1995) (per curiam) (*Microsoft I*) (quoting 28 U.S.C. § 2106). Because unfavorable rulings are "[a]lmost invariably ... proper grounds for appeal, not for recusal," we exercise this authority only in extraordinary cases. *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994).

Appendix A

Reassignment requests usually arise from accusations that a judge engaged in improper outside communications. *See, e.g., Microsoft I*, 56 F.3d at 1463-65 (instructing district court to reassign case where judge relied on a book that was not in evidence); *United States v. Microsoft Corp.*, 253 F.3d 34, 46 (D.C.Cir.2001) (en banc; per curiam) (ordering reassignment where trial judge "engaged in impermissible *ex parte* contacts by holding secret interviews with members of the media and made numerous offensive comments about Microsoft officials in public statements outside of the courtroom"). Indeed, earlier in this litigation, the government sought to remove the judge on that basis, claiming that he had received information gathered by Special Masters outside the adversarial process. *In re Brooks*, 383 F.3d at 1041. Accepting the judge's statement that "he did not receive *ex parte* communications substantively related to [pending contempt] proceedings," we denied the government's request. *Id.* at 1038.

Today, the government advances a different argument. Alleging no improper outside communications, the government instead claims the July 12 opinion's language, together with this court's repeated reversals of the district court's decisions, warrants reassignment. "No reasonable observer," the government argues, "would believe that a court that has viciously and baselessly denounced a cabinet department and its leadership as villainous racists could properly oversee its activities and adjudicate further claims." Appellants' Br. 53.

To prevail, the government has a heavy burden. As the Supreme Court observed in *Liteky v. United States*, although

"[t]he judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person," still "the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task." *Liteky*, 510 U.S. at 550-51, 114 S.Ct. 1147. Removal for bias is appropriate "even though [the judge's opinion] springs from the facts adduced or the events occurring at trial" only when "it is so extreme as to display clear inability to render fair judgment." *Id.* at 551, 114 S.Ct. 1147.

Applying *Liteky* is a delicate task. First and foremost, we must take special care to avoid undermining the ability of district judges to perform their responsibilities. Particularly in hard-fought litigation dealing with controversial issues, district judges must sometimes take strong actions and use strong words. Presiding over such challenging cases would become even more difficult if district judges had to worry that appellate courts would routinely review their decisions not just for legal error, but for bias as well. *See United States v. Roach*, 108 F.3d 1477, 1484 (D.C.Cir.1997) ("In a controversial, sharply contested case presided over by an experienced district judge, strongly stated judicial views rooted in the record should not be confused with judicial bias."), *vacated in part on other grounds*, 136 F.3d 794 (D.C.Cir.1998). For this reason, and because except in the most unusual circumstances we trust judges to put their personal feelings aside, recusal must be limited to truly extraordinary cases where, as *Liteky* puts it, the judge's views

have become "so extreme as to display clear inability to render fair judgment," *Liteky*, 510 U.S. at 551, 114 S.Ct. 1147.

In the rare case that meets the *Liteky* standard, however, removal is essential to "preserve[ ] both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)). The appearance of partiality cuts at the heart of the judicial system. *See Bridges v. California*, 314 U.S. 252, 282, 62 S.Ct. 190, 86 L.Ed. 192 (1941) (Frankfurter, J., dissenting) ("The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta."). Just as reassignment is necessary if reasonable observers could believe that improper outside contacts influenced a judicial decision, *see Microsoft I*, 56 F.3d at 1463, so too is reassignment necessary if reasonable observers could believe that a judicial decision flowed from the judge's animus toward a party rather than from the judge's application of law to fact.

With these principles in mind, we turn to the case before us, beginning with the language of the July 12 opinion. The government believes that "the court's moral condemnation has caused it to depart from judicial norms" and that the court has an "unshakeable view that Interior is guilty of global malfeasance, and that the court's duty is to ferret out the evidence of its misdeeds." Appellants' Br. 55. Plaintiff-beneficiaries have a very different view of the July 12

opinion. They insist that "[w]hile forcefully worded, the district court's rulings are founded entirely on the evidence of record set forth in more than nine years of litigation and over 200 days of evidentiary hearings." Appellees' Br. 31.

Although the July 12 opinion contains harsh-even incendiary-language, much of that language represents nothing more than the views of an experienced judge who, having presided over this exceptionally contentious case for almost a decade, has become "exceedingly ill disposed towards [a] defendant" that has flagrantly and repeatedly breached its fiduciary obligations. *Liteky*, 510 U.S. at 550, 114 S.Ct. 1147. We ourselves have referred to Interior's "malfeasance," "recalcitrance," "unconscionable delay," "intransigen[ce]," and "hopelessly inept management." *Cobell VI*, 240 F.3d at 1096, 1109; *Cobell XII*, 391 F.3d at 257; *Cobell XIII*, 392 F.3d at 463.

Yet portions of the July 12 opinion go further. Most seriously, although no one, not even the government, doubts that racism ran rampant at Interior a century ago, *see* Appellants' Reply Br. 19 (acknowledging that "a government expert witness ... agreed ... that Commissioner of Indian Affairs Sells, who held office in the early part of the last century, believed that white people were superior to Indians"), the July 12 opinion extends beyond historical racism and all but accuses *current* Interior officials of racism. "[O]ur 'modern' Interior department," the opinion declares, is "a dinosaur-the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought

we had left behind." *Cobell XV*, 229 F.R.D. at 7. Other statements reinforce the district court's apparent belief that racism at Interior is not just a thing of the past: "our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal." *Id.* The opinion also dismisses the possibility that "the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history." *Id.*

To be sure, Interior's deplorable record deserves condemnation in the strongest terms. Words like "ignominious" and "incompeten[t]" (the district court's) and "malfeasance" and "recalcitrance" (ours) are fair and well-supported by the record. Even drawing inferences of racism might well have been appropriate were Interior's motives relevant, as they would be in a discrimination case, for such inferences would be "necessary to completion of the judge's task," *Liteky*, 510 U.S. at 551, 114 S.Ct. 1147. Here, however, Interior's motive had nothing to do with the issue pending in the district court-whether inaccuracies in trust information require notice to Indian beneficiaries. Indeed, the district court made clear that it viewed the facts relevant to that inquiry as uncontested. *See Cobell XV*, 229 F.R.D. at 16 ("Interior does not dispute the factual predicates of the plaintiffs' argument.").

Other passages in the July 12 opinion are also troubling. The opinion describes Interior as an agency whose "spite"

has led it to turn its "wrath" on trust beneficiaries and engage in "willful misconduct," "iniquities," "scandals," "dirty tricks," and "outright villainy." *Id.* at 10, 11, 22. Words like these, especially given the limited issue the July 12 order resolves, suggest the district court has condemned not just Interior's particular failures as trustee, but the Department as an institution.

We have little doubt that this parade of serious charges, all unconnected to the issue before the district court, could contribute to a reasonable observer's belief that Interior stands no chance of prevailing whatever the merits of its position. But we need not decide whether such charges, standing alone, require reassignment, for the charges do not stand alone. Rather, they follow an unbroken string of reversed district court orders, all directed against Interior. As we have held, "[a]lthough a legal ruling may not itself serve as the basis for a motion to disqualify, a particular judicial ruling can be *evidence* of ... bias or prejudice." *United States v. Barry*, 938 F.2d 1327, 1340 (D.C.Cir.1991) (citations and internal quotation marks omitted).

Here, there is not just one "particular judicial ruling," but eight. In two, the district court imposed an inappropriate evidentiary burden on Interior (*Cobell XII* and *XIII*). In three, it underestimated the harmful effects its orders would have on the government (*Cobell XVII* and the two cases decided today). And in three others, it both assumed the mantle of a prosecutor and authorized biased investigations (*Cobell VIII*, *In re Brooks*, and *In re Kempthorne*). In four cases, we found abuses of discretion (*Cobell XII*, *XIII*, *XVII*, and No. 05-5388), in three (the mandamus actions) we found Interior

had a clear and indisputable right to relief (*Cobell VIII*, *In re Brooks*, and *In re Kempthorne*), and in one we found the district court had used a procedural rule to accomplish a substantive goal (this case). We set aside contempt citations against the Secretary and other senior Interior officials (*Cobell VIII*), and twice found that the district court awarded injunctive relief without the required evidentiary hearing (*Cobell XII* and *XVII*). Ten judges of this court have heard one or more of these appeals. Not one has dissented.

Plaintiff-beneficiaries insist the record is not as one-sided as the foregoing summary suggests. In a footnote, they assert that "[n]otably, the district court has ruled against plaintiffs or limited their relief sought." Appellees' Br. 41 n. 39. "Notably," however, they provide no citation to any such action. Asked at oral argument for examples of significant relief the district court had denied plaintiff-beneficiaries, counsel first cited the court's rejection of their request for a trial date on the adequacy of Interior's accounting for the named plaintiffs. But the district court denied that motion without prejudice because it "conclude[d] that the pendency of appellate review of the issues surrounding the defendants' accounting duties at issue in this litigation render[ed] it inappropriate to set a date for trial on those issues at [that] time," *Cobell v. Norton*, No. 96-1285 (D.D.C. June 3, 2005)-hardly a crushing blow. Counsel also cited the district court's 1998 denial of plaintiff-beneficiaries' request for interim relief. Given plaintiff-beneficiaries' sweeping victory in the subsequent bench trial, however, we hesitate to ascribe much significance to that decision. Finally, counsel observed that the district court has repeatedly refused to place the trust assets into receivership. But as the July 12 opinion makes

clear, those refusals stem not from any sympathy for Interior, but rather from the district court's concern that placing assets in receivership "would constitute an announcement that negligence and incompetence in government are beyond judicial remedy." *Cobell XV*, 229 F.R.D. at 22.

Plaintiff-beneficiaries' challenge to the uniformity of this court's reversals fares no better. Their only example of a break in the constant stream of reversals is our dismissal with prejudice of a government appeal. They neglect to mention, however, that the order they cite did not affirm on the merits, but instead responded to the government's motion for voluntary dismissal. *See Cobell v. Norton*, No. 03-5063, 2003 WL 22136383 (D.C.Cir. Sept.9, 2003).

In short, in case after case the district court granted extensive relief against Interior, and in case after case we reversed, even under highly deferential standards of review. To be sure, repeated reversals, without more, are unlikely to justify reassignment. But here there is more. For one thing, on several occasions the district court or its appointees exceeded the role of impartial arbiter by issuing orders without hearings and by actively participating in evidence-gathering. For another, the July 12 opinion levels serious charges against Interior and its officials, charges that not only bear no relationship to the issue pending before the court, but also go beyond criticizing Interior for its serious failures as trustee and condemn the Department as an institution.

From all of this evidence, "an objective observer is left with the overall impression," *Microsoft I*, 56 F.3d at 1463, that the district court's professed hostility to Interior has

become "so extreme as to display clear inability to render fair judgment," *Liteky*, 510 U.S. at 551, 114 S.Ct. 1147. What distinguishes this case from one in which a judge has merely become "exceedingly ill disposed towards [a party which] has been shown to be ... thoroughly reprehensible," *id.* at 550-51, 114 S.Ct. 1147, is, most certainly, not any redeeming aspect of Interior's behavior as trustee. Rather, what distinguishes this case is the combination of the content of the July 12 opinion and the nature of the district court's actions. Given these seemingly unique circumstances, and given that "justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954)—that is, reasonable observers must have confidence that judicial decisions flow from the impartial application of law to fact, not from a judge's animosity toward a party-we conclude, reluctantly, that this is one of those rare cases in which reassignment is necessary.

VI.

We close with a warning to the parties. In *Cobell VI*, we recognized that "the federal government has failed time and again to discharge its fiduciary duties," resulting in a serious injustice that has persisted for over a century and that cries out for redress. *Cobell VI*, 240 F.3d at 1086. Yet today, five years later, no remedy is in sight, this case continues to consume vast amounts of judicial resources, and growing hostility between the parties distracts from the serious issues in the case.

Our ruling today presents an opportunity for a fresh start. As the litigation proceeds, the government must remember

that although it regularly prevails on appeal, our many decisions in no way change the fact that it remains in breach of its trust responsibilities. In its capacity as trustee and as representative of all Americans, the government has an obligation to rise above its deplorable record and help fashion an effective remedy. For their part, counsel for plaintiff-beneficiaries, as counsel to a large class of Indians and as officers of the court, would more ably advance their worthy cause by focusing their energies on legal issues rather than on attacking the government and its lawyers.

The July 12 order is vacated and the matter remanded to the chief judge of the district court with instructions to reassign the case. We expect both parties to work with the new judge to resolve this case expeditiously and fairly.

So ordered.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED JULY 12, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 96-1285 (RCL)

ELOUISE PEPION COBELL, et al.,
on their own behalf and on behalf of
all those similarly situated,

Plaintiffs,

v.

GALE NORTON,
Secretary of the Interior, et al.,

Defendants.

MEMORANDUM OPINION

The plaintiffs' *Motion* [2746] *to Require Defendants to Give their Beneficiaries Notice of their Continuing Inability or Refusal to Discharge their Fiduciary Duties* presents one of the few questions in this case that remain unaddressed—whether the Court should order the distribution of a notice containing information about this litigation to the entire 500,000-member plaintiff class. Federal Rule of Civil Procedure 23(d), the extensive factual record, and the prior law of the case govern the answer. After considering the plaintiffs' motion, Interior's memorandum in opposition, the

plaintiffs' reply brief, the applicable law, and the entire record herein, the Court concludes that the plaintiffs' motion will be granted.

BACKGROUND

At times, it seems that the parties, particularly Interior, lose sight of what this case is really about. The case is nearly a decade old, the docket sheet contains over 3000 entries, and the issues are such that the parties are engaged in perpetual, heated litigation on several fronts simultaneously. But when one strips away the convoluted statutes, the technical legal complexities, the elaborate collateral proceedings, and the layers upon layers of interrelated orders and opinions from this Court and the Court of Appeals, what remains is the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal.

For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible

power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people.

The Indians who brought this case are beneficiaries of a land trust created and maintained by the government. The Departments of the Interior and Treasury, as the government's Trustee-Delegates, were entrusted more than a century ago with both stewardship of the lands placed in trust and management and distribution of the revenue generated from those lands for the benefit of the Indians. Of course, it is unlikely that those who concocted the idea of this trust had the Indians' best interests at heart—after all, the original General Allotment Act that created the trust was passed in 1887, at a time when the government was engaged in an "effort to eradicate Indian culture" that was fueled, in part, "by a greed for the land holdings of the tribes[.]" *Cobell v. Babbitt ("Cobell V")*, 91 F.Supp.2d 1, 7-8 (D.D.C.1999). But regardless of the motivations of the originators of the trust, one would expect, or at least hope, that the modern Interior department and its modern administrators would manage it in a way that reflects our modern understandings of how the government should treat people. Alas, our "modern" Interior department has time and again demonstrated that it is a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.

The present motion asks the Court to revisit what has become one in a list of lamentable circumstances revealed

by this litigation: Despite Interior's near wholesale abdication of its trust duties, the vast majority of the Indian beneficiaries remain unaware that anything is out of order. Interior distributes various kinds of information to Indian beneficiaries, and the beneficiaries, uninformed of the wretched state of things at Interior, make decisions that affect their trust assets on the basis of that information. The plaintiffs now ask the Court to consider the possibility that Interior's ghastly past performance calls into question the reliability of any information it distributes to the Indians. If Interior cannot truthfully guarantee that it is providing the beneficiaries with accurate information on which to base decisions that materially affect their interests in the trust, then the beneficiaries deserve, at the very least, a warning to that effect. Any ordinary, reasonable trustee under similar circumstances would have given each and every beneficiary such a warning years ago. Unhappily, Interior is no ordinary trustee.

A. Factual History

Interior's management of the Indian trust has been a nightmare from the beginning. A 1992 congressional report noted:

> Scores of reports over the years by the Interior Department's inspector general, the U.S. General Accounting Office, the Office of Management and Budget, and others have documented significant, habitual problems in the [Bureau of Indian Affairs's] ability to fully and accurately account for trust fund moneys, to properly discharge its

fiduciary responsibilities, and to prudently manage the trust funds.

Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. No. 102-449 (1992). Despite this show of concern, the record in this case establishes that Congress's efforts to address the problem have failed. Not surprisingly, Interior's internal efforts to reform trust management, lately undertaken at this Court's direction, have also universally crashed and burned. What remains is the same situation that obtained at the outset of this case: Interior's unremitting neglect and mismanagement of the Indian trust has left it in such a shambles that recovery may prove impossible.

The ignominious record speaks for itself. Interior "does not know the precise number of [Individual Indian Money trust ("IIM")] accounts that it is to administer and protect." *Cobell v. Norton ("Cobell VI")*, 240 F.3d 1081, 1089 (D.C.Cir.2001). Interior "does not know the proper balances for each IIM account, nor does Interior have sufficient records to determine the value of IIM accounts." *Cobell VI*, 240 F.3d at 1089. This Court has noted that "the United States freely gives out 'balances' to plaintiffs, [but] it admits that currently these balances cannot be supported by adequate transactional documentation." *Cobell V*, 91 F.Supp.2d at 10. And, "[c]urrent account reconciliation procedures are insufficient to ensure that existing account records, reported account balances, or payments to IIM beneficiaries are accurate." *Cobell VI*, 240 F.3d at 1089. One result is that Interior issues payments to Indian beneficiaries "in erroneous amounts—from unreconciled accounts—some of which are known to

have incorrect balances." *Cobell V*, 91 F.Supp.2d at 6. Interior cannot even determine which IIM account holders are members of the plaintiff class. *See* Mem. & Order [2587], May 28, 2004, at 2-3. Thus, every communication Interior issues to IIM account holders is likely to end up in the hands of at least some class members.

The Court has concluded that the 1994 Indian Trust Fund Management Reform Act "requires [Interior] to retrieve and retain all information concerning the IIM trust that is necessary to render an accurate accounting of all money in the IIM trust." *Cobell V*, 91 F.Supp.2d at 58. While the Court has consistently emphasized Interior's duty to preserve trust records against loss, damage, and destruction, it has become clear that Interior's complete and continuing default in this obligation remains a primary cause of its inability to properly administer the IIM trust. On February 22, 1999, the Court found that unchecked rodent infestations were damaging trust documents at storage facilities in Nebraska and New Mexico; and that trust documents and microfiche held by the Department of the Treasury had been recently destroyed. *See Cobell v. Babbitt*, 37 F.Supp.2d 6, 15, 22 n. 8, 28 (D.D.C.1999). These findings—and the realization that former Secretaries of the Interior and Treasury, along with an Assistant Secretary of the Interior for Indian Affairs, had mislead the Court with respect thereto—prompted the Court to cite those individuals for civil contempt. *Cobell*, 37 F.Supp.2d at 39-40. As an additional response, the Court appointed a Special Master who was charged with, among other things, ensuring that trust records were properly safeguarded during the pendency of this case. *See* Order [213], Feb. 22, 1999. While the Special Master's efforts were

informative, they proved to be an insufficient motivation for Interior to reform its records-management practices

Examples abound. The Special Master informed the Court that numerous Interior offices lacked the basic facilities and procedures to ensure the safety of trust documents retained in paper form. *See, e.g.*, Report of the Special Master Regarding Site Visits to Area and Agency Offices (Apr. 25, 1999); Report of the Special Master Regarding Site Visits to Area and Agency Offices (Oct. 29, 1999). He discovered trust records stored in puddles of water, near bags of fertilizer, and alongside containers of combustible fuels, tires, and debris of various kinds. *See* Third Report of the Special Master Regarding Site Visits to Area and Agency Offices (Nov. 12, 1999). He found remnants of trust documents that had been shredded. *See* Site Visit Report of the Special Master to the Office of Information Resources Management (Mar. 12, 2001). He reported that Interior's Office of the Special Trustee/Office of Trust Records, which is most directly responsible for ensuring the preservation of trust documents, had no effective trust records training program. *See* Second Investigative Report of the Special Master Regarding the Office of Trust Records (Apr. 11, 2002). The Special Master also alerted the Court that Interior had decided to relocate 32,000 boxes of active trust documents to the Lee's Summit Federal Records Center "without regard to the consequences" and with "utter indifference to the safety of these records or to the ability of IIM beneficiaries to have meaningful access to vital information[.]" *See* Emergency Report of the Special Master Regarding Defendants' Proposed Relocation of Records to the Lee's Summit Federal Records Center (Apr. 17, 2002), at 22-23.

Appendix B

Interior's management of electronic trust records has proven even more abysmal, if that is possible. *See, e.g.*, Report and Recommendation of the Special Master Regarding the Security of Trust Data at the Department of the Interior (Dec. 4, 2001) (describing a department-wide lack of electronic data security). The Court has disconnected various bureaus and offices within Interior from the Internet on more than one occasion on the basis of evidence that security for electronic trust data was inadequate. *See* Temporary Restraining Order [1036], issued Dec. 5, 2001, at 2; *Cobell v. Norton*, 274 F.Supp.2d 111, 135 (D.D.C.2003); *Cobell v. Norton*, 310 F.Supp.2d 98, 99- 100 (D.D.C.2004). In fact, the Court is currently conducting a lengthy evidentiary hearing on this very issue, which has been revived by the plaintiffs' newest allegations that electronically-stored Indian trust data is at risk of corruption.

The problems that result from Interior's inability to maintain complete and accurate records of the IIM trust are compounded and made more intractable by the penchant of Interior's employees, officials, and litigation counsel to be less than forthcoming with the Court. Aside from the 1999 contempt citations mentioned above, the Court also held Secretary of the Interior Gale Norton and former Assistant Secretary of Indian Affairs Neal McCaleb in civil contempt for, among other things, misleading the Court about the status of Interior's trust reform efforts and computer security. *See Cobell v. Norton*, 226 F.Supp.2d 1, 29-46, 88-130 (D.D.C.2002).[1] In December 2002, the Court referred a

1. While the contempt citations themselves were vacated on appeal, *see Cobell v. Norton*, 334 F.3d 1128, 1145-50 (D.C.Cir.2003), (Cont'd)

number of Interior's litigation counsel from the Department of Justice to the Court's Committee on Grievances after reviewing evidence indicating that they had participated in Interior's efforts to communicate with plaintiff-class members without authorization from plaintiffs' counsel in violation of D.C. Rule of Professional Conduct 4.2(a).[2] *See Cobell v. Norton*, 212 F.R.D. 14, 23-24 (D.D.C.2002). Though the Committee on Grievances determined that no further action was warranted, it is nevertheless telling that evidence supporting such a disciplinary referral was produced at all.

Add vindictiveness to dishonesty and managerial ineptitude. Interior has demonstrated a tendency to retaliate against both the Indian beneficiaries and its own employees when it feels slighted. On May 21, 1999, the Court entered an Order providing that:

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the Court of Appeals did not call this Court's findings of fact into question. As such, the factual findings that supported the 2002 contempt citations will be treated as having been established. *Cobell v. Norton*, 283 F.Supp.2d 66, 85 (D.D.C.2003).

2. Rule 4.2(a), also called the "anti-contact rule," requires that:

> [d]uring the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject matter of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Appendix B

> The Department of the Interior, together with all of its supervisory officials, are hereby enjoined from taking any retaliatory action, or making any threats of such action, for providing testimony or information in this action, against (1) any person who has identified as a potential witness in this case . . . , (2) any person who is called upon through legal process . . . to give testimony or provide other information in this litigation, or (3) any person individually identified by Plaintiffs, in writing, to Defendants as a potential witness in this action.

Order [277], May 21, 1999. On March 7, 2000, the plaintiffs submitted to the Court affidavits from Mona Infield, a Bureau of Indian Affairs employee, in support of their motion for a temporary restraining order to preserve trust records that appeared to be in imminent danger of destruction. The Court granted the plaintiffs' motion, see Order [451], Mar. 7, 2000, and it subsequently came to the Court's attention, after an investigation by the Special Master, that Interior had taken severe adverse employment actions against Ms. Infield after her affidavits were made public. *See* Recommendation and Report of the Special Master Concerning Plaintiffs' Motion for Order to Show Cause [670], Feb. 21, 2001, at 16 (concluding that "sufficient evidence [did exist] to support a finding of probable cause that the actions complained of by Infield were retaliatory and initiated in violation of the Court's [May 21, 1999] Order"); Mem & Order [1218], Mar. 29, 2002 (accepting the Special Master's findings).

Appendix B

The Court ordered Interior Secretary Gale Norton and Assistant Secretary Neal McCaleb to show cause why they should not be held in contempt for violating the Court's anti-retaliation order, see Mem. & Order [1480], Sept. 17, 2002, and the matter was later settled to the Court's satisfaction. *See* Stip. of Dismissal With Prejudice & Consent Order [1788], Feb. 6, 2003 (vacating Sept. 17, 2002 show cause order on stipulation of settlement by parties).[3] In the course of resolving the Infield matter, the Court cautioned Interior to "consider the prospect of future contempt proceedings before engaging in" further retaliatory behavior. Mem. & Order [1480], Mar. 29, 2002, at 5. It is illustrative enough of the depths to which Interior has sunk that the Court found it necessary to issue a general anti-retaliation order in the first place; but Interior's subsequent willful retaliation against its own employee in the face of such an order betrays a truly Machiavellian guile.

As if the Infield business was not enough, Interior's wrath was turned on the Indian beneficiaries themselves in

3. Initially, the Court declined to issue a show cause order in the Infield retaliation matter after Interior represented to the Court that it had compensated Ms. Infield by offering her a permanent position and paying her attorneys fees. *See* Mem. & Order [1480], Mar. 29, 2002 (denying motion for order to show cause). But the Court later learned that Interior's offers to compensate Infield were "illusory," and thus issued the order to show cause on renewed motion by the plaintiffs. *See* Mem. & Order, Sept. 17, 2002 (noting Interior's refusal to guarantee that the position offered to Ms. Infield would not be eliminated shortly after the show-cause motion was dismissed and that Interior's settlement offer included no provision for paying the plaintiffs' attorneys' fees in the matter; issuing order to show cause).

the wake of the Court's September 29, 2004 order restricting communications between Interior and class members concerning sales of Indian trust land (the "land-sales order"). *See Cobell v. Norton*, 225 F.R.D. 41, 53-54 (D.D.C.2004) (explaining the basis for the land-sales order); Order [2708], Sept. 29, 2004 (specifying restrictions on land-sale-related communications). Evidence collected by the plaintiffs demonstrated that "[d]uring the period between October 1, 2004 and October 8, 2004, a number of individual Indian trust beneficiaries were denied either their trust checks or information regarding their trust checks by BIA employees who cited this Court's [land-sales] Order as justification." *Cobell v. Norton*, 355 F.Supp.2d 531, 542 (D.D.C.2005). Of course, the Court had previously made clear at a hearing held on October 1, 2004, that the land-sales order had no effect whatsoever on Interior's ability to distribute trust checks. *See Cobell*, 355 F.Supp.2d at 533-34 (quoting Tr. (Stat Conf., Oct. 1, 2004): "to stop [trust checks] and [say] that it's because of [the land-sales] order is a flat-out lie.").

Apparently, Interior's withholding of trust checks or information about trust checks from the Indians was one outward manifestation of a period of Byzantine maneuvering within the department in an attempt to either evade or, failing that, mischaracterize and vilify this Court and the land-sales order. *See Cobell v. Norton*, 224 F.R.D. 266, 269-71 (D.D.C.2004) (discussing these activities in detail). As the Court explained, the evidence strongly supports the inference that:

> Either (1) the Secretary [of the Interior] was grossly negligent when she failed to add a

> proscription against the withholding of trust checks to the set of instructions distributed by Interior to the BIA on October 4, 2004, when the risk that checks would be withheld in the absence of such a proscription was reasonably foreseeable; or (2) the Secretary intentionally omitted a proscription against the withholding of trust checks from the October 4 instructions despite her knowledge that checks would likely be withheld in the absence of such a proscription.

Cobell, 355 F.Supp.2d at 542. In light of the record in this case, the Court found it more likely that the Secretary's actions constituted willful misconduct, and invited the Secretary to give testimony to the contrary if the Court's conclusion was in error. *See id.* at 542-43. The Secretary declined the Court's invitation.

But these are only examples. The entire record in this case tells the dreary story of Interior's degenerate tenure as Trustee-Delegate for the Indian trust—a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered with scandals, deception, dirty tricks and outright villainy—the end of which is nowhere in sight. Despite the breadth and clarity of this record, Interior continues to litigate and relitigate, in excruciating fashion, every minor, technical legal issue. *See Cobell v. Norton*, 357 F.Supp.2d 298, 306-07 (D.D.C.2005). This is yet another factor forestalling the final resolution of the issues in this case and delaying the relief the Indians so desperately need. *See id.* It is against this background of mismanagement, falsification, spite, and obstinate litigiousness that this Court is to evaluate the general reliability of the information Interior distributes to IIM account holders.

Appendix B

B. Procedural History

This is not the first time the Court has considered authorizing some form of notice to plaintiff-class members, though the propriety of class-wide notice is a matter of first impression. On December 23, 2002, pursuant to Federal Rule of Civil Procedure 23(d), the Court ordered that Interior could no longer conduct communications with Indian trust beneficiaries that threatened their rights as class members (the "class communication order"). *See Cobell*, 212 F.R.D. at 24. The broad relief granted in the class communication order was predicated on the Court's finding that the cover letter Interior included with certain account statements distributed to a number of IIM account holders— which gave the recipient a fairly narrow window of time in which to appeal the content of the statement before it became final— had the effect of extinguishing Indian beneficiaries' rights to a full and accurate accounting of their trust assets. *See Cobell*, 212 F.R.D. at 17. The class communication order suspended Interior's mailing of any future account statements until the Court's approval was obtained. *See id.* at 20. On May 28, 2004, the Court approved Interior's proposal to mail a number of account statements along with a notice informing recipients that they might be class members and that the account statement would not adversely effect their rights in this litigation. *See* Mem. & Order [2587], May 28, 2004, at 5-6. The Court found that this notice was sufficient to protect class members against the particular kind of harm threatened by the account statements. *See id.* at 4-5.

Later in 2004, the Court considered whether Interior's communications with Indian trust beneficiaries concerning

sales of Indian trust land threatened to extinguish the class rights by facilitating the permanent alienation of trust corpus on the basis of inadequate or incorrect information from Interior. Concluding on the weight of the evidence that the communications did pose such a threat, and that they therefore violated the class communication order, the Court invoked Rule 23(d) to suspend land-sales-related communications between Interior and the plaintiff class. *See Cobell*, 225 F.R.D. at 53-54. The Court later approved, as it did for the account statements mentioned above, a form of notice designed to protect class members' rights to be included with all land-sales-related communications going forward. *See Cobell*, 224 F.R.D. at 288-89. Approval of this notice followed a series of hearings conducted by the Court to address Interior's befuddlement concerning the effect of the Court's land-sales order.

Interior was particularly confused about what types of communications were covered by the Court's order. Specifically, the Court found it necessary to expressly exclude from the notice requirement communications between Interior and Indian beneficiaries concerning: "1. Encumbrances, leasing, lease sales, permitting, rights of way, and timber sales of or on individually-owned Indian trust land; 2. The investment of trust funds in [individual Indian money trust] accounts; 3. Estate planning, will drafting and the probate of or relating to Indian trust assets; 4. The surveying or appraisal of trust assets; 5. Title to trust lands; 6. Ownership of trust fund lands; [and] 7. Physical improvement or alteration of trust assets." *See Cobell*, 224 F.R.D. at 288.

It is obvious that none of these kinds of communications are subject to an order that specifies communications

regarding the *sale* of Indian trust land, as the Court verbally confirmed when Interior raised the question. *See* Tr. (Hrng., Oct. 1, 2004), at 11-12; 18-19. Nevertheless, Interior halted all these sorts of communications with Indians on the basis of a stubbornly formalist and acontextual reading of the Court's order. Interior's "reasoning" in this regard was exposed when Sandra Spooner, trial counsel for Interior at the time, informed the Court that one paragraph of the Court's land-sales order "is not limited ... to land sales. We believe that that is what the Court intended, but we did not feel at liberty ... to assume that that's what the Court meant when that is not what the order said specifically." Tr. (Hrng., Oct. 1, 2004), at 14. Spooner advised the Court that Interior's management took this paragraph to preclude "all communications" with IIM beneficiaries, see *id.* at 18, despite the lack of reference to any type of communication other than communications related to sales of trust land in either the land-sales order or the accompanying Memorandum Opinion.

The Court explained that the categories of communications determined to be outside the scope of the land-sales order had not been considered because the were not properly before the Court at the time,[4] and that the Court

4. Interior characterizes this decision as the Court's "explicit [ ] recogni[tion]" that these other types of communications are "ones for which prior notice is not needed." Defs.' Opp., at 9. To the contrary, however, the Court expressly reserved the "question of notice to everyone under all circumstances[,]" to be taken up "separately in another month, or whenever it's ripe." Tr. (Hrng., Oct. 19, 2004), at 21. Interior's contention that the Court exempted other types of communications from any future notice requirement at the time of the land-sales order is a flagrant misrepresentation of the record.

"would like to be educated similarly if there are any of these other items that [the Court] ought to be doing something about." Tr. (Hrng., Oct. 1, 2004), at 19. Later, the Court invited additional briefing concerning whether communications between Interior and Indian beneficiaries beyond those related to land sales should be subject to a broader Rule 23(d) order. *See* Tr. (Hrng., Oct. 19, 2004), at 21. The plaintiffs submitted the present motion in response to the Court's invitation.

DISCUSSION

The plaintiffs' motion once again asks this Court to grant relief under Federal Rule of Civil Procedure 23(d). The plaintiffs argue that all communications from Interior to Indian beneficiaries containing IIM trust-related information threaten to extinguish the recipients' rights as members of the plaintiff class. As such, they conclude, all such communications should be accompanied by a notice similar to notices the Court has required Interior to distribute in the past. Additionally, the plaintiffs want Interior to bear the burden and cost of distributing the notice. The Court agrees with the plaintiffs, and will order that Interior include a modified version of the plaintiffs' proposed notice with all written communications from Interior to current and former IIM account holders at Interior's expense.[5]

5. Interior's tongue-in-cheek summary of its responses to the plaintiffs' motion—"The Proposed Notice is the wrong notice at the wrong time to the wrong group of recipients paid for, and sent out by, the wrong party[,]" Defs.' Opp. at 2—typifies the level of respect that Interior generally accords both the Indian beneficiaries and this

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Appendix B

i. Rule 23(d) Legal Standard

Interior has previously conceded and does not now dispute this Court's authority to restrict Interior's communications with Indian beneficiaries pursuant to Rule 23(d). *See Cobell*, 212 F.R.D. at 19 (citing Defs.' Supp. Opp. Br. at 3; Defs.' Surreply at 5-6). Rule 23(d), allows a Court presiding over a class action to "impose conditions on the representative parties[,]" *Cobell*, 212 F.R.D. at 19 (citing *In re School Asbestos Litig.*, 842 F.2d 671, 683 (3d Cir.1988)), including restrictions on communications with class members if those communications are found to "interfere with the proper administration of a class action . . . [or] abuse [ ] the rights of members of the class."[6] *Id.* (quoting *Jack Faucett*

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Court. The puerile reference is not lost on the Court, but Interior's misguided attempt at levity in the context of litigating an issue of immense importance to 500,000 members of a historically oppressed people is disgraceful. Unfortunately, it is also unsurprising from a defendant that this Court has charged with "setting the gold standard for arrogance in litigation strategy and tactics." *Cobell*, 357 F.Supp.2d at 307. This Court has played host to countless pleadings from clinically insane litigants and prison inmates but has rarely seen such a disrespectful tenor in a court filing.

6. Contrary to the first argument in Interior's opposition, Rule 23(d) places no time-related condition on the Court's authority to issue restrictive orders. *See* Defs.' Opp., at 2-4 (pointing out at length that "Plaintiffs' do not explain in their Motion why, after nearly eight years of silence on all of the significant events in this case, a 'mid-litigation, informational notice,' . . . is urgently needed now"). Rule 23(d) does not require that a restrictive order be predicated on some

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Assocs., Inc. v. Am. Tel. & Tel. Co., 1985 WL 25746 at *5 (D.D.C.1985)).

Importantly, restrictive orders issued under Rule 23(d) need not be predicated on "a finding of actual harm; [Rule 23(d)] authorizes the imposition of a restricting order to guard against the '*likelihood* of serious abuses.' " *In re School Asbestos Litig.*, 842 F.2d at 683 (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981)). The Supreme Court directs that Rule 23(d) orders "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil*, 452 U.S. at 101, 101 S.Ct. 2193 (as quoted in *Cobell*, 212 F.R.D. at 19).

The only right to be weighed against the need for a limiting order is Interior's First Amendment right to free speech. *See Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d

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"recent event" in a case, see Defs.' Opp., at 4, but rather imbues the Court with "ample discretion" to fulfill its duty to restrict communications that threaten class members' rights. *See Kleiner*, 751 F.2d at 1203; *Jack Faucett Assocs.*, 1985 WL 25746 at *5. Additionally, if the Court finds that Interior's communications with the Indian beneficiaries threaten class rights, those communications violate the class communications order. Surely Interior does not mean to argue that the Court's inherent authority to enforce its own orders is subject to some sort of timing requirement. But if that is the argument, there is no warrant for the claim that such a requirement exists. The only temporal limitation on the Court's consideration of action under Rule 23(d) is the requirement that such issues be raised on an appropriately briefed, ripe motion from one of the parties.

1193, 1205-06 (11th Cir.1985) (cautioning that free speech rights must bear on the decision to issue a Rule 23(d) order restricting communications). The *Kleiner* Court indicated that a finding of "good cause" is sufficient to support restricting communications, provided that the issuing court shows a "heightened sensitivity" for the First Amendment implications of the restriction. *See Kleiner*, 751 F.2d at 1205-06. The existence of good cause is determined by evaluating "the severity and the likelihood of the perceived harm; the precision with which the order is drawn; the availability of a less onerous alternative; and the duration of the order." *Id.* The Court has already decided that threats to class rights are of adequate severity to support the issuance of a Rule 23(d) order where the proponent of the order establishes that the threatened harm is likely to occur. *See Cobell*, 212 F.R.D. at 20. The Court also previously determined that including a curative notice with harmful communications for the duration of the litigation is sufficiently precise in contour and limited in duration to avoid impinging on free-speech rights. *See id.* Finally, requiring notice is less onerous than the alternative of prohibiting the harmful communications altogether.

ii. Law of the Case: The Class Communications Order and the Land-Sales Order

Pursuant to its authority under Rule 23(d), the Court entered the class communications order to prohibit Interior from conducting with the Indian beneficiaries "any communications that affect the rights of class members to a full and accurate accounting of their Individual Indian Money trust accounts." *Cobell*, 212 F.R.D. at 24. The Court excluded from the effect of this Order "regular sorts of business

communications with class members that occur in the ordinary course of business," as such communications "do not purport to extinguish the rights of the class members in this litigation." *Id.* at 20-21.

Interior contends that this exception amounts to a *per-se* rule that communications occurring in Interior's ordinary course of business do not threaten class rights, *see* Defs.' Opp. at 8-9 (arguing that "ordinary course of business communications by definition are communications where the rights of absent class members are not at risk"), and thus that it precludes the relief requested here because most or all of the communications with which the plaintiffs are concerned take place in the ordinary course of Interior's business. *See id.* This argument betrays a misunderstanding of both the class communication order and its ordinary-course-of-business exception.

In determining whether to issue the class communication order, the Court focused its Rule 23(d) inquiry on the *effects* of the challenged communications, explaining with respect to the account statements that "what this Court considers improper is sending notices to individual class members that *have the effect* of extinguishing [their] rights. . . ." *Cobell*, 212 F.R.D. at 19 (emphasis added). The Court's attention to the actual effects rather than the "types" of the challenged communications debunks the defendants' characterization of the ordinary-course-of-business exception as a *per-se* rule. At least one respected treatise endorses the Court's reasoning, explaining that ordinary-course-of-business communications may be exempted from a Rule 23(d) restrictive order "as long as the communications do not relate to the claims involved

in the litigation. . . ." 3 Newberg on Class Actions § 15.18 (3d ed.1992) (as quoted in *Cobell*, 212 F.R.D. at 17).

Indeed, though Interior argued that the communications restricted by the Court's land-sales order occurred in the ordinary course of Interior's business, see *Cobell*, 225 F.R.D. at 52, the Court nevertheless found it necessary to restrict those communications. The Court again based its exercise of Rule 23(d) authority not on the "type" of communication at issue, but rather on the land-sales-related communications' actual effects on class rights. *See Cobell*, 225 F.R.D. at 52-53. The land-sales order stands for the proposition that even Interior's ordinary-course-of-business communications may threaten class rights and thereby violate the class communication order.

In analyzing the land-sales issue, the Court noted that "the underlying rationale for enforcing the right to an accounting is to facilitate informed decision-making with respect to the disposition of trust assets." *Cobell*, 225 F.R.D. at 52. "That means, at the very least, that the trust beneficiaries should retain all or most of their trust assets in as unaltered a state as is practicable, until Interior completes the required accounting," so that the completed accounting "can support the kind of informed disposition of trust assets that ought to be facilitated by conscientious management by a principled fiduciary." *Id.* The Court elaborated:

> [w]hile it is difficult to envision the ways in which information about this litigation and the historical accounting that Interior has been ordered to

> produce would affect the decision of any given trust beneficiary on whether or not to sell trust land, it is impossible to imagine that such information would have no effect at all. If the underlying rationale for enforcing the right to an accounting is to facilitate informed decision-making with respect to the disposition of trust assets, then to allow beneficiaries to continue to make decisions that substantially alter their trust interests without information about this litigation and Interior's obligations is to effectively rob those beneficiaries of the cash value of their rights.

Id. The plaintiffs now argue that all communications between Interior and IIM beneficiaries similarly rob class members of the "cash value" of their right to an accounting.

iii. Interior's Communications with Indian Beneficiaries

The plaintiffs advance a single argument in support of class-wide notice: In light of Interior's record, no information disseminated by Interior to class members can be presumed reliable. As such, any decisions that Indian beneficiaries make on the basis of information from Interior likely will be less-than-fully informed, although the Indians have no way to know that. One of the rights the plaintiffs seek to vindicate in this litigation is the right of the Indian beneficiaries to a full and accurate accounting of the Indian trust, which is essentially the right to have complete and reliable information on which to base decisions affecting their interests in the trust. Thus, the plaintiffs insist, inducing the beneficiaries to make trust-related decisions before completion of the

court-ordered accounting is tantamount to extinguishing their rights to that accounting. *See* Plaintiffs' Motion [2746] to Require Defendants to Give Their Beneficiaries Notice of Defendants' Continuing Inability or Refusal to Discharge Their Fiduciary Duties ("Pls.' Mot."), at 1-2.

One response in Interior's opposition is quite general. Perhaps attempting to capitalize on the plaintiffs' odd choice of title, Interior contends that "Plaintiffs do not really seek to communicate with the class and give them a . . . mid-litigation update on the status of the case and the right to consult with class counsel. Rather, . . . Plaintiffs now seek to have the Court recognize a novel new trust duty—the duty to notify beneficiaries that a trustee has breached its trust duties. . . ." Defendants' Opposition [2755] to Pls.' Mot. ("Defs.' Opp."), at 4. The Court of Appeals has held, Interior posits, that this Court may only enforce a particular common-law fiduciary duty against Interior if that duty has a statutory basis, see *Cobell v. Norton*, 392 F.3d 461, 471-72 (D.C.Cir.2004), and neither this Court nor the Court of Appeals has yet declared that Interior has a statutorily-based obligation to disclose its breaches of fiduciary duty to trust beneficiaries. As the plaintiffs cite no statute that expressly or impliedly creates such a duty, Interior has persuasively refuted the title of the plaintiffs' motion. But the motion itself, which only requests that class members be notified of the potential unreliability of Interior's trust-related communications, survives this argument quite well.[7]

7. Interior further asserts that "[t]he parties are vigorously disputing the nature of this Court's jurisdiction and authority to use the type of inherent equitable powers available to a 'chancellor' in

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Appendix B

This Court has noted that "[i]t is not the accounting in and of itself that is the desired product of this Court's enforcement of Interior's fiduciary obligations. Rather ... the Court intends that trust beneficiaries remain, after this litigation is completed, in a position in which the accounting that Interior must generate will be in some meaningful sense beneficial." *Cobell*, 225 F.R.D. at 52. The court-ordered accounting is designed to promote class members' rights to make fully informed choices about their trust assets. If there are no more informed decisions to be made, or if all the trust assets are gone, then the court-ordered accounting will be

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equity in the current appeals of the Phase 1.5 structural injunction and the IT preliminary injunction." Defs.' Opp. at 6. It is unclear what Interior means to dispute with this argument. It is possible that this represents an additional argument against the strawman characterization of the plaintiffs' requested relief just mentioned. If so, it is irrelevant.

The argument is also irrelevant as an attack on this Court's authority under Rule 23(d) to impose today's new notice requirement, which authority flows from the fact that this case is a class action rather than from the Court's equitable powers. Indeed, the majority of the questions about the scope of this Court's equitable powers in this case have been resolved by the Court of Appeals in favor of expansive remedial authority. *See generally Cobell v. Norton*, 391 F.3d 251, 257-58 (D.C.Cir.2004); *Cobell v. Norton*, 392 F.3d 461, 468-75 (D.C.Cir.2004). Finally the notice set forth in today's order makes no mention of the few matters that remain disputed on appeal.

useless to the Indians.[8] This is the core of the plaintiffs' right to an accounting that supported the land-sales order, and that similarly supports additional Rule 23(d) relief when the Court identifies other communications that violate the class communication order by threatening to interfere with the Indians' right to fully informed trust-related decision-making.

Interior does not dispute the factual predicates of the plaintiffs' argument. Interior concedes that all trust-related information Interior communicates to Indian beneficiaries is inherently unreliable. Of course, anything other than a concession of this point would be laughable in light of the record in this case. The factual record, composed of the accumulated detritus of nine years spent examining Interior's odious performance as Trustee-Delegate for the Indian trust, is certainly clear enough and smattered with a sufficient number of specific abuses to satisfy the *Gulf Oil* standard for relief under Rule 23(d). If Interior cannot even ascertain the number of existing IIM account holders, how can any of its more complicated calculations, such as land appraisals, be trusted? If Interior is willing to deceive this Court, why would anyone think that Interior would hesitate to lie to the Indians?

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8. Of course, the only way to fully safeguard this right would be to suspend all trust-related decision-making until this case concludes and Interior actually provides the required accounting, so that the maximum number of decisions affecting trust assets could be as fully informed as possible. Unfortunately, such a course of action is impracticable. The inclusion of class-wide notice containing information about this litigation and contact information for plaintiffs' counsel with each threatening communication from Interior will have to suffice as an interim measure.

Interior also concedes that Indian beneficiaries make decisions that affect their trust assets in reliance on information from Interior. Together, these concessions entail the conclusion that communications from Interior threaten class members' right to make fully informed decisions about their trust assets. Thus, all communications from Interior to class members containing information on which a class member might base a trust-related decision violate the class communication order for the same reason that land-sales-related communications were found to violate the class communication order. For this reason, the Court will again supplement the class communication order to require that henceforth every written communication from Interior to current and former IIM account holders must contain a notice designed to protect the rights of the class. The functional effect of the relief granted today is to eliminate the "ordinary course of business" exception from the class communications order.

The Court will require that notice accompany all written communications from Interior to current or former IIM account-holders because Interior cannot determine which IIM account-holders are class members.[9] The Court will not, however, require that notice accompany oral communications. Interior has previously used supposed

9. Again, the Court takes no position on the disputed issue of the scope of the plaintiff class. *See Cobell*, 224 F.R.D. at 269 n. 1; Mem. & Order, May 28, 2004, at 5. While Interior disputes the plaintiffs' claim that many former IIM account holders are class members, it is nevertheless prudent, in the interest of full coverage, to send notice to anyone who might wind up in the plaintiff class after resolution of the legal disputes.

restrictions on oral communications to the disadvantage of the Indian beneficiaries. *See Cobell*, 224 F.R.D. at 270 (noting that Interior closed down BIA offices and routed telephone calls to prerecorded messages in an effort to "adhere" to what Interior perceived to be the Court's restriction on land-sales-related oral communications); *id.* at 288 (clarifying that the land-sales order had never been "applicable to oral communications, either in person or by telephone . . ." to prevent any further "misinterpretations").

Notice must accompany all written communications from Interior to current or former IIM account-holders without regard to subject matter. This requirement ensures maximum protection, as it is difficult to determine, *ex ante*, the kinds of information that might influence an Indian beneficiary's trust-related decisions. With so much at stake, the Court greatly prefers over-inclusion to under-inclusion. Furthermore, this requirement should make today's Order clear enough to forestall the kind of confusion and misadventure that held sway at Interior in the wake of the Court's land-sales order. And, relieving Interior of the undoubtedly complicated and time-consuming task of differentiating between kinds of communications also seems to significantly decrease the resource-burden imposed by today's notice requirement.[10]

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10. Interior contends that this requirement entails "the absurd result in which the . . . [n]otice would be attached to communications regarding health care, education, and other topics that are unrelated to the subject matter of this case." Defs.' Opp. at 8 n. 6. But this is not an argument at all. Interior does not claim, for example, that including the required notice in communications related to health

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Appendix B

Additionally, it is not obvious that Interior is correct to characterize this result as "absurd." Many class members depend on the IIM trust as their primary (or sole) source of income. Whenever these Indians spend money on prescription medications or school supplies, they do so because they think their IIM trust income is sufficient to allow for these expenditures. Or, if Indians decide to forego purchasing prescription drugs, notebook paper, and the like, it may be because their Interior-drafted account statement tells them they cannot afford these things. In either case, inaccuracies in Interior's trust-related information may relate directly to health care and education decisions. It is certainly inappropriate for Interior to declare, as a general matter, that "health care" and "education . . . are unrelated to the subject matter of this case." Indeed, for some Indians there may be no aspect of everyday life that is unrelated to the subject matter of this case. This observation throws into sharp relief not only the gravity of Interior's responsibilities as Trustee-Delegate, but also the inestimable cost of Interior's failure in that role.

iv. Burden and Cost of Providing Class-Wide Notice

The plaintiffs argue that Interior, rather than the plaintiffs, should bear the costs—both financial and logistical—of providing the required notice. *See* Pls.' Mot.

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care and education will make the notice requirement somehow unduly burdensome. Unless Interior feels that this Court should be in the business of avoiding absurdity as an evil in itself (in which case Interior should have long ago moved to strike the majority of its own pleadings from the record in this case), it is difficult to understand how any possible overbreadth in the notice requirement is not justified by the need to maximize protection of class rights.

at 12-20. Nefariously, this is the only argument in the plaintiffs' motion that Interior genuinely attempts to take issue with. See Defs.' Opp. at 11. Nevertheless, Interior's arguments are ultimately unconvincing, and the Court will require that Interior expend both the effort and the funds required to ensure that the notice approved in today's order goes out with all future communications from Interior to current or former IIM account holders.

Generally, the "plaintiff must bear the cost of notice to the class[.]" *Eisen v. Carlisle Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). However, the Supreme Court has provided that "where a defendant can perform one of the tasks necessary to send notice [to a plaintiff class], such as identification [of the class members], more efficiently than the representative plaintiff, the district court has discretion to order him to perform the task under rule 23(d)." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). Where a district court orders a class-action defendant to perform a task necessary to distribute notice to the class, the court "must exercise its discretion in deciding whether to leave the cost of complying with its order where it falls, on the defendant, or place it on the party who benefits, the representative plaintiff." *Oppenheimer Fund*, 437 U.S. at 358, 98 S.Ct. 2380.

Interior claims that shifting the notice-related costs and burdens to a class-action defendant is warranted only if the notice is "needed to protect class member rights." Defs.' Opp. at 10-11 (discussing the kinds of notices involved in cases cited in the plaintiffs' motion: a notice designed to prevent erroneous deportation of class members; a mandatory opt-

out notice; and a mandatory notice of dismissal). This is a throwaway argument—Interior's postulated rule is nowhere to be found in the *Oppenheimer Fund* case, which controls this issue and requires only that the district court adjudge it more efficient to shift the burden and expense of notice to the defendant. Indeed, had Interior bothered to address *Oppenheimer Fund* at all, it would have been clear that there is a distinction between the test for whether a court should require notice to the class under Rule 23(d) on the one hand and the standard governing the allocation of the burdens and costs of distributing that notice on the other. Only the former inquiry involves an evaluation of potential harm to class members' rights.[11] And, even under the defendants' make-believe legal standard, shifting the burdens and costs of notice to Interior would be justified because the Court has concluded

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11. Interior makes much the Ninth Circuit's emphasis in the *Barahona-Gomez* case on the risk that class members might be erroneously deported in the absence of notice. *See* Defs.' Op. at 10-11 (citing *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1236 (9th Cir.1999)). But the Ninth Circuit made clear that the risk to class members justified the district court's *imposition* of a notice requirement. *See Barahona-Gomez*, 167 F.3d at 1236 ("the district court did not err in requiring notice to the class [under Rule 23(d)]. . . .The Court found that notice . . . would prevent the irreparable harm of an erroneous deportation."). Distinctly, when reviewing the district court's decision to allocate to the defendant the cost and work associated with providing notice, the *Barahona-Gomez* Court focused on the burden to the government, noting that the required notice "can easily be attached to an order denying a class member's suspension application," and that "the government made no presentation as to any additional costs associated with providing this notice." *Id.* at 1237. Thus, the Ninth Circuit distinguished the standards for requiring notice and allocating the costs of notice in the same manner suggested here.

above that the notice approved today is, in fact, necessary to protect class member rights.[12]

The Supreme Court provides guidance for allocating the work involved in sending notice, advising district courts to consider whether the defendant can perform some notice-related task "with less difficulty or expense than could the representative plaintiff." *Oppenheimer Fund*, 437 U.S. at 356, 98 S.Ct. 2380. Here, including the required notice in mailings that Interior already planned to distribute to IIM account holders will be substantially more efficient than requiring the plaintiffs to send out the notices in a separate mass mailing. Interior has ready access to contact information for IIM account holders, so that for Interior, all that today's order really requires is the insertion of one additional piece of paper into regular mailings. Moreover, the principal purpose of the notice approved today is to warn the Indians about the potential unreliability of Interior's communications.

12. Because this section of Interior's opposition is ambiguous on its face, the Court allows that this may be a different argument—namely, the argument that burden- and feeshifting related to sending class notice is *per-se* inappropriate in class actions where, as here, the class is certified under Federal Rule of Civil Procedure 23(b)(2). The only plausible predicate for this argument is the observation that Rule 23(b)(2), unlike Rule 23(b)(3), does not *mandate* distribution of notice to the class. But this distinction does not affect the Court's discretion under Rule 23(d). There is no salient difference between a case in which notice is required by the Federal Rules and one where notice is mandated by court order. Further, there is precedent for the applicability of *Oppenheimer Fund*'s explanation of a district court's Rule 23(d) authority to class actions certified under Rule 23(b)(2). *See Barahona-Gomez*, 167 F.3d at 1236-37 (applying *Oppenheimer Fund* to shift notice-related tasks to defendant in class action certified under Fed.R.Civ.P. 23(b)(2)).

Including the notices with the communications they reference reduces the potential for confusion and misinterpretation of the notice. The Court will, therefore, allocate to Interior the tasks of (1) preparing enough copies of the notice for one copy to be included in every written communication sent to a current or former IIM account-holder; and (2) attaching a copy of the notice to each such communication prior to distribution.

This allocation is consistent with *Oppenheimer Fund.* Discussing the considerations that should bear on a district court's distribution of the work involved in sending class notice, the Supreme Court noted that "district courts ... have found it appropriate to order a defendant . . . to perform tasks other than identification [of class members] that are necessary to the sending of notice." *Oppenheimer Fund,* 437 U.S. at 355, 98 S.Ct. 2380. Implicitly endorsing this Court's approach, the *Oppenheimer Fund* Court cites with approval instances where defendants have been ordered to "enclose class notices in their own periodic mailings to class members in order to reduce the expense of sending the notice." *Id.* at 355 n. 22, 98 S.Ct. 2380 (citing as examples *Ste. Marie v. Eastern R. Assn.*, 72 F.R.D. 443, 450 n. 2 (S.D.N.Y.1976); *Gates v. Dalton,* 67 F.R.D. 621, 633 (E.D.N.Y.1975); *Popkin v. Wheelabrator-Frye, Inc.*, 20 Fed. R. Serv.2d 125, 130 (E.D.N.Y.1975)).

To determine which party should bear the monetary cost of sending notice to the class, "the test should be whether the expense is substantial." *Oppenheimer Fund,* 437 U.S. at 359, 98 S.Ct. 2380. If found to be substantial, the court "should be considerably more ready to place the cost of the

defendant's performing an ordered task on the representative plaintiff, who derives the benefit[.]" *Id.* at 358, 98 S.Ct. 2380. The cost of performing a notice-related task allocated to the defendant may remain with the defendant, for example, where the "expense involved [is] so insubstantial as not to warrant the effort required to calculate it and shift it to the representative plaintiff," or where "the task ordered is one that the defendant must perform in any event in the ordinary course of its business." *Id.* at 359, 98 S.Ct. 2380.

Including the approved notice in its mailings to current or former IIM account holders falls squarely within the ordinary course of Interior's business. *See Oppenheimer Fund*, 437 U.S. at 359 n. 28, 98 S.Ct. 2380 (citing orders requiring defendants to include notice in periodic mailings as appropriate instances of shifting cost of task to defendants as part of "ordinary course of business"). But even the cost of an ordinary-course-of business task should be borne by the plaintiff if the expenses involved would be "substantial." *See id.* Interior makes no argument that the cost of including notice in mailings to IIM account holders would be substantial, and the insertion of one additional sheet of paper into each mailing does not seem likely to generate appreciable expense.[13] The Court thus concludes that Interior should expend the cost as well as the effort required to distribute the approved notice as provided in today's Order.

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13. For example, adding one extra page to Interior's regular mailings is unlikely to increase the weight of those mailings enough to require additional postage. Indeed, by eschewing any requirement that Interior attempt to differentiate either among IIM account holders or types of communications when including the notice, the Court seems to have imposed the least costly procedure possible.

Appendix B

v. Content of the Required Notice

Interior objects to much of the content of the plaintiffs' proposed notice, which reads as follows:

> You are receiving this notice because as an individual Indian trust beneficiary, you may be a member of the plaintiff class in the *Cobell v. Norton* litigation.
>
> The *Cobell v. Norton* litigation was filed by Elouise Cobell and other named plaintiffs on June 10, 1996 in the U.S. District Court for the District of Columbia on behalf of all current and past beneficiaries of the Individual Indian Money ("IIM") Trust ("*Cobell* Class"). This lawsuit is an action in equity to enforce the trust duties that the United States government owes to the *Cobell* Class. Named as defendants are the Interior Secretary, the Assistant Interior Secretary-Indian Affairs, and the Secretary of the Treasury who, in their official capacities, are trustee-delegates for the government in the management and administration of the IIM Trust ("Trustee-Delegates"). The Trustee-Delegates have admitted that they do not know whether the information that they are providing to you about your Trust assets is accurate and complete. In addition, they have been held in breach of fiduciary duties that the United States government owes the *Cobell* Class. As a result, the Trustee-Delegates have been ordered to provide the Cobell Class an accounting

of their conduct and an accounting of all items of the IIM Trust since its inception. They also have been ordered to discharge their trust duties in accordance with all applicable statutory, treaty, and common law.

A future trial is necessary, but is not yet scheduled, for the Court to assess the adequacy of the Trustee-Delegates' accounting. Until such time as the Court has judged an accounting to be adequate and it has found that the Trustee-Delegates are discharging their fiduciary duties prudently and in accordance with law, the Court in Cobell v. Norton has determined that it is essential to ensure that communications by and between the government and the Cobell Class do not interfere with the class members' right to an accurate and complete accounting or otherwise adversely affect their rights in this litigation.

In that regard, the United States Court of Appeals has held that each individual Indian trust beneficiary has a right to an accurate and complete accounting and other relevant information regarding his or her trust assets. However, the government is currently unable to provide all individual Indian trust beneficiaries an accurate and complete accounting of their trust assets and is unable to provide a timetable for when that accounting will be rendered. A beneficiary's right to request and receive relevant information regarding their trust assets is not on hold pending

> the resolution of this litigation on the merits or the rendition of an adequate accounting. Any beneficiary may request that the government provide relevant information regarding their trust assets at reasonable intervals.
>
> Each class member also has a right to consult with class counsel regarding this notice or their rights as individual Indian trust beneficiaries. For further information you may access the *Cobell* Class website, www.indiantrust.com or contact the following counsel for the *Cobell* Class: Dennis M. Gingold, Esq., 607 14th Street, N.W., 9th Floor, Washington, DC 20005, phone: (202) 824-1448, fax: (202) 318-2372, email: dennismgingold @aol.com, or Keith Harper, Esq., Native American Rights Fund, 1712 N Street, N.W., Washington, DC 20036-2976, phone: (202) 785-4166, fax: (202) 822-0068, email: harper@narf.org.

Pls.' Mot., Ex. 1 (Proposed Order), at 2-3 (footnote omitted).

Interior correctly observes that the Court rejected similar language in the plaintiffs' proposed land-sales notice, Defs.' Opp. at 6, because "several of the assertions in the plaintiffs' proposed notice are disputed matters currently pending before the Court of Appeals." *Cobell*, 224 F.R.D. at 280. While many of Interior's appellate issues have been resolved, see generally *Cobell v. Norton*, 391 F.3d 251 (D.C.Cir.2004) (resolving appeal of preliminary injunction related to security of electronic trust data at Interior); *Cobell v. Norton*, 392 F.3d 461 (D.C.Cir.2004) (resolving the majority of Interior's

issues related to the structural injunction issued after Trial 1.5), some matters related to the now-reissued structural injunction remain pending. *See, e.g., Cobell*, 357 F.Supp.2d 298 (reissuing portion of structural injunction vacated but not addressed on the merits); Defendants' Notice of Appeal [2869], filed Mar. 4, 2005 (informing the Court that Interior would appeal the reissuance of the structural injunction). As some of the statements in the plaintiffs' proposed class-wide notice may be disputed on Interior's remaining appeals, the Court will edit the notice accordingly.[14]

Interior next contends that Federal Rule of Civil Procedure 23(h)(1) requires that today's notice also contain information about the plaintiffs' August 17, 2004 Petition for Interim Fees under the Equal Access to Justice Act (the "interim fee petition"). *See* Defs.' Opp. at 12. Rule 23(h)(1) requires that claims "for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2)" and that "[n]otice of [such] motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." FED. R. CIV. P. 23(h)(1). Though the plaintiffs' interim fee request was filed as a petition under the Equal Access to Justice Act rather than as a Rule 54(d)(2) motion, the Advisory Committee

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14. Interior also "vigorously dispute[s] ... any description which inaccurately states that the duties of the various Defendants are co-extensive." Defs.' Opp. at 7 n. 4. The Court need not attempt to determine whether the Defendants' duties are in fact identical, as only Interior's duties are relevant to the central purpose of this notice. Indeed, there need be no specific enumeration of the defendants' various fiduciary duties in the notice. It is enough for informational purposes that the notice name the defendants.

notes emphasize that Rule 23(h)(1) was intended to "provide[] a format for all awards of attorney fees and nontaxable costs in connection with a class action[.]" Notice to the class of all fee motions is required, the Advisory Committee explains, because "[f]ee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions," such that "members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party[.]"

The Rule 23(h)(1) notice requirement provides the class with sufficient information to question objectionable fee requests and to scrutinize any potential conflicts of interest that arise from certain payment scenarios, and these benefits do not vary with the procedural mechanism by which fees are sought. Rule 23(h)(1)'s purpose thus dictates that class members must be notified of any fee request made by class counsel regardless of the provision of law authorizing the request, including the plaintiffs' interim fee petition. However, Rule 23(h)(1) does *not* require the Court to include information about the interim fee petition in today's class-wide notice. To the contrary, the Rule requires only that the class be notified "in a reasonable manner," leaving the Court with some latitude to determine the proper form and timing of notice. Information about the interim fee petition is beyond the scope of the limited informational aims of the notice ordered today, and not at all germane to its central purpose of advising class members of the unreliability of Interior's trust information. The Court thus concludes that including fee information in today's notice would be an unreasonable manner of notifying the class of the plaintiffs' petition. The

Court will, however, order that plaintiffs' counsel submit to the Court a proposed notice to the class regarding the interim fee petition, as well as a proposal for distributing that notice to class members.

Having resolved Interior's content-related objections, the Court also finds that the plaintiffs' proposed notice is too long, contains overwrought language and sentence structure, and communicates unnecessary details. When paring down the plaintiffs' proposed land-sales notice, the Court expressed its faith in "the ability of plaintiffs' counsel to provide all who inquire with additional information related to the details of this litigation; as well as with a full description of the rights of class members." *Cobell*, 224 F.R.D. at 280. The Court retains this faith today, and concludes that providing contact information for plaintiffs' counsel in today's notice allows for omission of some detail.

The Court will require that the following modified notice be included in all future written communications from Interior, its agents, representatives, employees, officials, or counsel to past or present IIM account holders:

> Please be aware that past and present Individual Indian Money ("IIM") Trust account holders may be members of a class action lawsuit, *Cobell v. Norton*, No. 1:96CV01285 (D.D.C.) (Judge Lamberth). The defendants in this lawsuit, the Secretary of the United States Department of the Interior and the Secretary of the United States Department of the Treasury, are the federal government's Trustee-Delegates for the IIM Trust.

Appendix B

The Court in the *Cobell* case has ruled that the Department of the Interior must provide each IIM Trust beneficiary with a complete and accurate accounting of his or her IIM Trust account. Because other related matters are not yet resolved, the *Cobell* case is still pending and the accounting has not yet been completed.

While the *Cobell* case is ongoing, the Court in has determined that it is essential to ensure that communications from the Department of the Interior do not adversely affect the rights of IIM Trust account holders who are also members of the *Cobell* lawsuit. For that reason, this notice is included with this communication for the information of current and former IIM Trust account holders.

Evidence introduced in the *Cobell* case shows that *any* information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets that current and former IIM Trust account holders receive from the Department of the Interior may be *unreliable.* Current and former IIM Trust account holders should keep in mind the questionable reliability of IIM Trust information received from the Department of the Interior if and when they use such information to make decisions affecting their IIM Trust assets.

Current and former IIM account holders have the right to consult with the attorneys for the class in

Cobell v. Norton regarding this notice or any other matter related to the IIM Trust. For further information you may access the *Cobell* class website, www.indiantrust.com or contact the following attorneys representing the *Cobell* class: Dennis M. Gingold, Esq., 607 14th Street, N.W., 9th Floor, Washington, DC 20005, phone: (202) 824-1448, fax: (202) 318-2372, email: dennismgingold@aol.com, or Keith Harper, Esq., Native American Rights Fund, 1712 N Street, N.W., Washington, DC 20036-2976, phone: (202) 785-4166, fax: (202) 822-0068, email: harper@narf.org.

CONCLUSION

While it is undeniable that Interior has failed as a Trustee-Delegate, it is nevertheless difficult to conjure plausible hypotheses to explain Interior's default. Perhaps Interior's past and present leaders have been evil people, deriving their pleasure from inflicting harm on society's most vulnerable. Interior may be consistently populated with apathetic people who just cannot muster the necessary energy or emotion to avoid complicity in the Department's grossly negligent administration of the Indian trust. Or maybe Interior's officials are cowardly people who dodge their responsibilities out of a childish fear of the magnitude of effort involved in reforming a degenerate system. Perhaps Interior as an institution is so badly broken that even the most well-intentioned initiatives are polluted and warped by

the processes of implementation.[15] The government as a whole may be inherently incapable of serving as an adequate fiduciary because of some structural flaw. Perhaps the Indians were doomed the moment the first European set foot on American soil. Who can say? It may be that the opacity of the cause renders the Indian trust problem insoluble.

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15. This hypothesis may be the most plausible, as there is some evidence to substantiate it. In June, 2002, Interior filed with the Court a report generated by Interior's Office of Inspector General ("OIG") following an investigation of "seven specific issues relating to allegations that senior managers and attorneys of the Department of the Interior ... engaged in misconduct." *See* Notice [1355] of Filing the Office of Inspector General's Report: Allegations Concerning Conduct of Department of the Interior Employees Involved in Various Aspects of the Cobell Litigation ("OIG Rep."), June 25, 2002, exec. summ. at 1. This investigation was conducted during the pendency of the 2002 contempt trial mentioned above. In the course of investigating Interior, the OIG "uncovered bad judgment, unfocused management, a myriad of definitional issues, and extreme hostility among the players and entities[,]" and "found factions with extremely myopic views of and approaches to the very complex issues at hand." OIG Rep., exec. summ. at 2. The OIG noted that in its decades of oversight of Interior, "we have often observed ... a Department whose components are blinded by clouded judgment and crippled by distrust [,]" *id.* at 6, characterized by a "bunker mentality" in which Interior employees generally "begin by protecting [their] own Bureau or office, to the detriment of other Bureaus or offices if necessary; then protect the Department, and/or the institution or position it has advanced; [and] finally, protect the public interests ...." *Id.* The OIG found that while Interior's various entities and employees are "fueled by a multitude of motivations, many of which were well-intentioned[,]" *id.* at 2, one of the least prevalent motivations "was to protect and advance the interests of Individual Indian Trust account holders." *Id.*

Appendix B

On numerous occasions over the last nine years, the Court has wanted to simply wash its hands of Interior and its iniquities once and for all. The plaintiffs have invited the Court to declare that Interior has repudiated the Indian trust, appoint a receiver to liquidate the trust assets, and finally relieve the Indians of the heavy yoke of government stewardship. The Court may eventually do all these things—but not yet. Giving up on rehabilitating Interior would signal more than the downfall of a single administrative agency. It would constitute an announcement that negligence and incompetence in government are beyond judicial remedy, that bureaucratic recalcitrance has outpaced and rendered obsolete our vaunted system of checks and balances, and that people are simply at the mercy of governmental whim with no chance for salvation. The Court clings to a slim and quickly receding hope that future progress may vitiate the need for such a grim declaration.

This hope is sustained in part by the fact that the Indians who brought this case found it in themselves to stand up, draw a line in the sand, and tell the government: Enough is enough—this far and no further. Perhaps they regret having done so now, nine years later, beset on all sides by the costs of protracted litigation and the possibility that their efforts may ultimately prove futile; but still they continue. The notice requirement established by the Court today represents a significant victory for the plaintiffs. For the first time in the history of this case, the majority of Indian beneficiaries will be aware of the lawsuit, the plaintiffs' efforts, and the danger involved in placing any further confidence in the Department of the Interior. Perhaps more importantly, the Indians will be advised that they may contact class counsel for guidance

on their trust-related concerns. This likely will bring to light a wealth of new evidence concerning Interior's mismanagement of the trust; it will also open an avenue to relief for individuals throughout Indian country whose suffering might otherwise be buried forever in a bureaucratic tomb.

Real justice for these Indians may still lie in the distant future; it may never come at all. This reality makes a statement about our society and our form of government that we should be unwilling to let stand. But perhaps the best that can be hoped for is that people never forget what the plaintiffs have done here, and that other marginalized people will learn about this case and follow the Indians' example.

A corresponding Order will issue today.

Signed by Royce C. Lamberth, United States District Judge, July 12, 2005.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 96-1285 (RCL)

ELOUISE PEPION COBELL, et al.,
on their own behalf and on behalf of
all those similarly situated,

Plaintiffs,

v.

GALE NORTON,
Secretary of the Interior, *et al.*,

Defendants.

ORDER

In accordance with the Memorandum Opinion issued this date, and upon consideration of the plaintiffs' Motion [2746] to Require Defendants to Give their Beneficiaries Notice of their Continuing Inability or Refusal to Discharge their Fiduciary Duties, the opposition thereto, the reply brief, the applicable law, and the entire record herein, it is hereby

ORDERED that the plaintiffs' Motion [2746] to Require Defendants to Give their Beneficiaries Notice of their Continuing Inability or Refusal to Discharge their Fiduciary Duties is GRANTED; it is further

Appendix B

ORDERED that the following language from the second ordered paragraph of the Court's December 23, 2002 Memorandum and Order [1692] is VACATED:

> The instant Order does not prohibit defendants from communicating with class members in the ordinary course of business on routine matters unrelated to the instant litigation.

It is further ORDERED that the Interior must, within twenty (20) days of this date, complete all preparations and distribute all instructions necessary to ensure the implementation of this Order; and it is further

ORDERED that, beginning twenty-one (21) days from this date and continuing until either the conclusion of this litigation or further Order of the Court, all written communications, including electronic mail ("e-mail") and facsimile communications, from Interior, its agents, representatives, employees, officials, or counsel to any current or former Individual Indian Money ("IIM") Trust account holder must include the following notice:

> Please be aware that past and present Individual Indian Money ("IIM") Trust account holders may be members of a class action lawsuit, *Cobell v. Norton*, No. 1:96CV01285 (D.D.C.) (Judge Lamberth). The defendants in this lawsuit, the Secretary of the United States Department of the Interior and the Secretary of the United States Department of the Treasury, are the federal government's Trustee-Delegates for the IIM Trust.

Appendix B

The Court in the *Cobell* case has ruled that the Department of the Interior must provide each IIM Trust beneficiary with a complete and accurate accounting of his or her IIM Trust account. Because other related matters are not yet resolved, the *Cobell* case is still pending and the accounting has not yet been completed.

While the *Cobell* case is ongoing, the Court in has determined that it is essential to ensure that communications from the Department of the Interior do not adversely affect the rights of IIM Trust account holders who are also members of the *Cobell* lawsuit. For that reason, this notice is included with this communication for the information of current and former IIM Trust account holders.

Evidence introduced in the *Cobell* case shows that *any* information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets that current and former IIM Trust account holders receive from the Department of the Interior may be *unreliable*. Current and former IIM Trust account holders should keep in mind the questionable reliability of IIM Trust information received from the Department of the Interior if and when they use such information to make decisions affecting their IIM Trust assets.

Current and former IIM account holders have the right to consult with the attorneys for the class in

Cobell v. Norton regarding this notice or any other matter related to the IIM Trust. For further information you may access the *Cobell* class website, www.indiantrust.com or contact the following attorneys representing the *Cobell* class: Dennis M. Gingold, Esq., 607 14th Street, N.W., 9th Floor, Washington, DC 20005, phone: (202) 824-1448, fax: (202) 318-2372, email: dennismgingold @aol.com, or Keith Harper, Esq., Native American Rights Fund, 1712 N Street, N.W., Washington, DC 20036-2976, phone: (202) 785-4166, fax: (202) 822-0068, email: harper@narf.org.

It is further ORDERED that, within thirty (30) days of this date, Interior shall file with the Court and serve upon the plaintiffs a certification detailing the arrangements that Interior has made for implementation of this Order, including all instructions and other notices regarding this Order distributed to Interior bureaus, offices, employees, or agents, and certifying that the notice specified herein is being distributed in compliance with this Order; and it is further

ORDERED that no communications of any kind between Interior and any person or entity shall be suspended, halted, withheld, or delayed in any manner or for any period of time as a result or consequence of this Order. This Order does not affect either: (1) the processing or distribution by Interior, its agents, representatives, employees, or officials of any checks or other funds in any form to any person; or (2) oral communications between Interior, its agents, representatives, employees or officials and any person, whether in person or by telephone.

It is further ORDERED that the plaintiffs shall, within a reasonable time after this date, file with the Court and serve upon the defendants a proposed notice to the plaintiff-class concerning the plaintiffs' Petition for Interim Fees Under the Equal Access to Justice Act, as well as a proposed plan for distributing that notice to the class.

SO ORDERED.

Signed by Royce C. Lamberth, United States District Judge, July 12, 2005.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED SEPTEMBER 26, 2006

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5269

September Term, 2006

96cv01285

Filed On: September 26, 2006

[993936] Elouise Pepion Cobell, et al.,

Appellees

v.

Dirk Kempthorne, Secretary of the Interior, et al.,

Appellants

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith* and Kavanaugh,* Circuit Judges, and Silberman, Senior Circuit Judge

---

* Circuit Judges Griffith and Kavanaugh did not participate in this matter.

Appendix C

ORDER

Upon consideration of appellees' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 26, 2006

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5269

September Term, 2006

96cv01285

Filed On: September 26, 2006

[993937] Elouise Pepion Cobell, et al.,

Appellees

v.

Dirk Kempthorne, Secretary of the Interior, et al.,

Appellants

BEFORE: Tatel and Brown, Circuit Judges, and Silberman, Senior Circuit Judge

Appendix D

ORDER

Upon consideration of appellees' petition for rehearing filed August 25, 2006, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

FILED
FEB 21 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-868

In the Supreme Court of the United States

ELOUISE PEPION COBELL, ET AL., PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in directing that this case be reassigned to a different district court judge.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Allied-Signal Inc., In re, 891 F.2d 967 (1st Cir. 1989), cert. denied, 495 U.S. 957 (1990) 14
Brooks, In re, 383 F.3d 1036 (D.C. Cir. 2004), cert. denied, 543 U.S. 1150 (2005) 2
Cobell v. *Kempthorne*, 455 F.3d 301 (D. C. Cir. 2006), petition for cert. pending, No. 06-867 (filed Dec. 19, 2006) 3
Cobell v. *Norton*:
240 F.3d 1081 (D.C. Cir. 2001) 2
334 F.3d 1128 (D.C. Cir. 2003) 2, 13
310 F. Supp.2d 102 (D.D.C. 2004) 13
391 F.3d 251 (D.C. Cir. 2004) 2
392 F.3d 461 (D.C. Cir. 2004) 2
428 F.3d 1070 (D.C. Cir. 2005) 2, 3
Kempthorne, In re, 449 F.3d 1265 (D.C. Cir. 2006) 3, 13
Liteky v. *United States*, 510 U.S. 540 (1994) 6, 9

Statutes and rule:

Administrative Procedure Act, 5 U.S.C. 706(1) 2

Statutes and rule—Continued: Page

American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (25 U.S.C. 4001 *et seq.*) 2
§ 102(a), 108 Stat. 4240 (25 U.S.C. 4011(a)) 2
28 U.S.C. 2106 6
Fed. R. Civ. P. 23(d)(3) 5, 6

Miscellaneous:

H.R. Rep. No. 499, 102d Cong., 2d Sess. (1992) 2

In the Supreme Court of the United States

No. 06-868

ELOUISE PEPION COBELL, ET AL., PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 455 F.3d 317. The opinion of the district court (Pet. App. 39a-83a) is reported at 229 F.R.D. 5.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2006. A petition for rehearing was denied on September 26, 2006 (Pet. App. 91a-92a). The petition for a writ of certiorari was filed on December 19, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of the Interior (DOI) administers approximately 260,000 Individual Indian Money

(IIM) trust accounts with balances totaling approximately $400 million. See C.A. App. 524; H.R. Rep. No. 499, 102d Cong., 2d Sess. 2 (1992); 428 F.3d 1070, 1072 (D.C. Cir. 2005). In 1994, Congress enacted the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (25 U.S.C. 4001 *et seq.*), which requires the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to" a 1938 statute dealing with investment of trust monies. § 102(a), 108 Stat. 4240 (25 U.S.C. 4011(a)). In 1996, a class of present and former IIM accountholders filed this lawsuit, asserting that the government had failed to provide a timely, adequate accounting. In 2001, the court of appeals held that the agency's performance of required accounting activities had been "unreasonably delayed" within the meaning of 5 U.S.C. 706(1). 240 F.3d 1081, 1108 (D.C. Cir. 2001).

On eight subsequent occasions, including in the decision below, the court of appeals vacated or set aside district court orders directed against DOI and senior government officials. See 334 F.3d 1128, 1137-1150 (D.C. Cir. 2003) (reversing an order of contempt against the Secretary and Assistant Secretary, and issuing a writ of mandamus to direct the removal of a "Special Master-Monitor" appointed by the district court); *In re Brooks*, 383 F.3d 1036, 1044-1046 (D.C. Cir. 2004) (granting a writ of mandamus to recuse another court-appointed special master from contempt proceedings), cert. denied, 543 U.S. 1150 (2005); 391 F.3d 251, 258-262 (D.C. Cir. 2004) (vacating an injunction requiring DOI to disconnect its computers from the internet); 392 F.3d 461, 465-478 (D.C. Cir. 2004) (vacating a structural injunction

purporting to dictate the scope and methods of DOI's accounting activities and to enforce compliance with DOI's fiduciary responsibilities); 428 F.3d at 1074-1079 (vacating the accounting portion of the same structural injunction after the district court reissued it verbatim); *In re Kempthorne*, 449 F.3d 1265, 1268-1272 (D.C. Cir. 2006) (granting a writ of mandamus to recuse a special master and to suppress tainted reports); 455 F.3d 301, 307-317 (D.C. Cir. 2006) (vacating an injunction requiring DOI to disconnect its computers from the internet, as well as from all internal networks)[1]; Pet. App. 1a, 10a-15a (vacating an injunction requiring DOI to include, in all communications with class members, a notice declaring that all trust-related information from DOI "may be unreliable"). In the last of those decisions, the court of appeals also directed that the case be reassigned to a different district court judge. See *id.* at 15a-37a.

2. The instant petition arises from the court of appeals' reassignment order. On July 12, 2005, the district court ordered DOI to include a specified notice in all written communications with class members. See Pet. App. 85a-88a. The notice stated that "[e]vidence introduced" in the instant case shows that DOI's trust-related information "may be *unreliable*," and it warned class members to "keep in mind the questionable reliability of IIM Trust information received from the [DOI] if and when they use such information to make decisions affecting their IIM Trust assets." *Id.* at 86a.

In an accompanying opinion, the district court broadly disparaged DOI and its officers and employees. *Inter alia*, the court characterized the "'modern' Interior de-

[1] The court of appeals' vacatur of that injunction is the subject of a separate petition for a writ of certiorari, which is currently pending before this Court. See No. 06-867 (filed Dec. 19, 2006).

partment" as a "dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind." Pet. App. 41a. The court stated:

> For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people.

Id. at 40a-41a. The court further asserted that "[t]he entire record in this case tells the dreary story of [DOI's] degenerate tenure as Trustee-Delegate for the Indian trust—a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered with scandals, deception, dirty tricks and outright villainy—the end of which is nowhere in sight." *Id.* at 51a.

In the concluding section of its opinion, the district court suggested various possible explanations for the

conduct of current and former DOI officials. The court stated:

> Perhaps [DOI's] past and present leaders have been evil people, deriving their pleasure from inflicting harm on society's most vulnerable. [DOI] may be consistently populated with apathetic people who just cannot muster the necessary energy or emotion to avoid complicity in the Department's grossly negligent administration of the Indian trust. Or maybe [DOI's] officials are cowardly people who dodge their responsibilities out of a childish fear of the magnitude of effort involved in reforming a degenerate system. Perhaps [DOI] as an institution is so badly broken that even the most well-intentioned initiatives are polluted and warped by the processes of implementation.

Pet. App. 80a-81a. The crucial point, the court declared, is "the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal." *Id.* at 40a.

3. The court of appeals vacated the class notice order as beyond the scope of the district court's authority. Pet. App. 10a-15a. The court of appeals noted that the district court had relied on Rule 23(d)(3) of the Federal Rules of Civil Procedure in support of its order that DOI inform all class members in every communication it has with them—even those having nothing to do with their individual Indian trust accounts—that DOI's trust-related information may be unreliable and that the recipients should keep that problem in mind when making

decisions about their accounts. See Pet. App. 4a-5a, 10a, 14a-15a. The court of appeals held, however, that "nothing in Rule 23(d)(3) supports" that order because Rule 23(d)(3) authorizes conditions on representative parties or intervenors, not defendants. Pet. App. 10a-11a. The court of appeals noted that petitioners did not defend the district court's "flawed reliance on Rule 23(d)(3)," *id.* at 11a, and it rejected petitioners' attempt to defend the order under Rule 23(d)(2), which the district court had not even cited, *id.* at 11a-15a. Petitioners do not seek review in this Court of the court of appeals' reversal of the district court's order requiring class-wide notice.

In the same ruling, the court of appeals exercised its authority under 28 U.S.C. 2106 to remand the case with instructions that it be reassigned to a different district court judge. Pet. App. 15a-37a. The court of appeals recognized that, under this Court's precedent, "recusal must be limited to truly extraordinary cases where * * * the judge's views have become 'so extreme as to display clear inability to render fair judgment.'" *Id.* at 30a-31a (quoting *Liteky* v. *United States*, 510 U.S. 540, 551 (1994)). The court further observed, however, that reassignment is "necessary if reasonable observers could believe that a judicial decision flowed from the judge's animus toward a party rather than from the judge's application of law to fact." *Id.* at 31a.

With respect to the denunciations of present and former DOI officials contained in the July 12, 2005, opinion, the court of appeals found that much of the district court's language, while "harsh" and "even incendiary," reflected an acceptable expression of the district court's views concerning DOI's performance of its trust responsibilities. Pet. App. 32a. The court of appeals also

found, however, that other aspects of the district court's opinion—particularly the district court's sweeping allegations of racism and other ill motives—were more troubling, both because those allegations "had nothing to do with the issue pending in the district court," *id.* at 33a, and because they "suggest the district court has condemned not just [DOI's] particular failures as trustee, but the Department as an institution," *id.* at 34a. The court of appeals "ha[d] little doubt that this parade of serious charges, all unconnected to the issue before the district court, could contribute to a reasonable observer's belief that [DOI] stands no chance of prevailing whatever the merits of its position." *Ibid.*

The court of appeals declined, however, to decide whether the district court's denunciations of DOI, "standing alone," would constitute a sufficient basis for reassignment. Pet. App. 34a. The court found it unnecessary to resolve that question because the district court's denunciations did not stand alone. Rather, the court of appeals explained, the district court's most recent opinion "follow[ed] an unbroken string of reversed district court orders, all directed against [DOI]." *Ibid.* The court of appeals explained:

> In two [appeals], the district court imposed an inappropriate evidentiary burden on [DOI] * * * . In three, it underestimated the harmful effects its orders would have on the government * * * . And in three others, it both assumed the mantle of a prosecutor and authorized biased investigations * * * . In four cases, we found abuses of discretion * * * , in three (the mandamus actions) we found [DOI] had a clear and indisputable right to relief * * * , and in one we found the district court had used a procedural rule to accomplish a substantive goal (this

> case). We set aside contempt citations against the Secretary and other senior [DOI] officials * * *, and twice found that the district court awarded injunctive relief without the required evidentiary hearing * * * . Ten judges of this court have heard one or more of these appeals. Not one has dissented.

Id. at 34a-35a; see *id.* at 36a ("In short, in case after case the district court granted extensive relief against [DOI], and in case after case we reversed, even under highly deferential standards of review."). The court further noted that "on several occasions the district court or its appointees exceeded the role of impartial arbiter by issuing orders without hearings and by actively participating in evidence-gathering." *Ibid.* Based on the totality of the circumstances, including the series of prior reversals and the denunciations of DOI in the district court's July 12, 2005, opinion, the court of appeals concluded that "an objective observer is left with the overall impression that the district court's professed hostility to [DOI] has become so extreme as to display clear inability to render fair judgment," and that reassignment was accordingly warranted. *Id.* at 36a-37a (citation and internal quotation marks omitted).

In closing, the court of appeals observed that its ruling "presents an opportunity for a fresh start" in resolving the issues in this long-running litigation, and the court expressed its expectation that "both parties [will] work with the new judge to resolve this case expeditiously and fairly." Pet. App. 37a, 38a.

4. The court of appeals denied petitioners' requests for rehearing and rehearing en banc. Pet. App. 89a-92a. No member of the court of appeals requested a vote on the en banc petition. *Id.* at 90a. On December 7, 2006,

the case was reassigned to the Honorable James Robertson.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Although petitioners assert (Pet. 19-21) that the decision below conflicts with rulings of this Court and other courts of appeals, they do not contend that the D.C. Circuit misstated the legal standards governing reassignment motions. Petitioners observe (Pet. 19-20) that this Court's decision in *Liteky* v. *United States*, 510 U.S. 540 (1994), "makes plain that a district judge's conduct in the performance of his judicial function normally is not a basis for removal and reassignment." The court of appeals did not dispute that principle, however, but explicitly recognized that "unfavorable rulings are '[a]lmost invariably . . . proper grounds for appeal, not for recusal.'" Pet. App. 28a (quoting *Liteky*, 510 U.S. at 555). The court of appeals further recognized that, barring improper outside communications, a judge's unfavorable opinion of a litigant does not provide a basis for reassignment unless that opinion is "so extreme as to display clear inability to render fair judgment." *Id.* at 30a (quoting *Liteky*, 510 U.S. at 551).

Although petitioners allege a conflict in the circuits (Pet. 21), the cited cases simply recognize that erroneous legal rulings will not ordinarily raise an inference of bias or provide a basis for reassignment. Because the court of appeals acknowledged that general rule, its decision is consistent with the precedents on which petitioners rely. Petitioners, moreover, cite no decision holding that erroneous legal rulings, no matter how nu-

merous or deeply flawed, can *never* be suggestive of judicial bias.

2. As the court of appeals explained, the district court's most recent opinion in this case accused "*current* Interior officials of racism." Pet. App. 32a. The district court denounced the "'modern' Interior department" as "a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglo-centrism we thought we had left behind." *Id.* at 41a. The court explicitly rejected the hypothesis that "the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history." *Id.* at 40a. It described DOI as an agency "whose 'spite' has led it to turn its 'wrath' on trust beneficiaries and engage in 'willful misconduct,' 'iniquities,' 'scandals,' 'dirty tricks,' and 'outright villainy.'" *Id.* at 33a-34a.

As the court of appeals explained, those allegations "not only bear no relationship to the issue pending before the [district] court, but also go beyond criticizing [DOI] for its serious failures as trustee and condemn the Department as an institution." Pet. App. 36a. The district court thus sweepingly branded a Department in a coordinate Branch of Government, staffed by thousands of civil servants involved in the administration of Indian affairs, as badly motivated and irredeemably tainted in the performance of one of its central missions. The D.C. Circuit correctly found that "this parade of serious charges, all unconnected to the issue before the district court, could contribute to a reasonable observer's belief

that [DOI] stands no chance of prevailing whatever the merits of its position." *Id.* at 34a. Petitioners make no effort to dispute that conclusion, which was an important basis for the court of appeals' reassignment order. Nor do petitioners explain how any litigant could properly be subjected to ongoing supervision by a judge who has condemned it in this manner. See Pet. 17 n.14.

3. Petitioners contend (Pet. 17) that "[t]he reassignment decision relies on the court of appeals' conclusion that the reversal of Judge Lamberth in eight appeals on a range of issues over a three-year period evinces an appearance of bias on his part." Petitioners argue at some length (Pet. 23-27) that the various district court rulings that were reversed by the D.C. Circuit constitute isolated missteps rather than a pattern of overreaching suggestive of judicial bias. That argument lacks merit and provides no basis for this Court's review.

a. The court of appeals did not base its reassignment decision on the pattern of prior reversals standing alone, but on the *combination* of that pattern and the district court's July 12, 2005, denunciations of DOI as an institution. See Pet. App. 36a, 37a. Contrary to petitioners' suggestion (Pet. 17), the fact that the D.C. Circuit declined to decide whether those denunciations *alone* would have warranted reassignment does not mean that the district court's intemperate charges are irrelevant to the propriety of the reassignment order. Indeed, petitioners acknowledge that the relevant inquiry is whether "a reasonable and objective observer, *knowing all the circumstances*, would conclude that the judge's impartiality might reasonably be questioned." Pet. 23 (internal quotation marks omitted). Under that totality-of-the-circumstances approach, the combination of the district court's disparagement of DOI *and* the

court's repeated erroneous rulings created a strong appearance of bias, whether or not either of those factors standing alone would have warranted reassignment.[2]

b. As the court of appeals emphasized, the D.C. Circuit has repeatedly reversed the district court in this case "even under highly deferential standards of review." Pet. App. 36a. "In four cases, [the court of appeals] found abuses of discretion," and "in three (the mandamus actions) [the court] found [DOI] had a clear and indisputable right to relief." *Id.* at 34a-35a.

The court of appeals also properly attached particular significance to the fact that "on several occasions the district court or its appointees exceeded the role of impartial arbiter by issuing orders without hearings and by actively participating in evidence-gathering." Pet. App. 36a. Petitioners attempt to distance the district court from the conduct of the special masters it appointed. See Pet. 13-14, 24. As the court of appeals explained in prior rulings, however, the district court failed adequately to supervise its appointees and condoned the conduct that the court of appeals found unacceptable. The district court "charged [one special master] with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial

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[2] Petitioners attribute to the court of appeals the "conclusion that, although *Judge Lamberth had no actual bias*, an objective observer would reasonably believe that he appeared not to be impartial." Pet. 16. Contrary to petitioners' suggestion, the court of appeals did not find that the district court lacked actual bias. The court of appeals did not purport to resolve the question of actual bias one way or the other, but simply stated that, based on the totality of the circumstances, "an objective observer is left with the overall impression that the district court's professed hostility to [DOI] has become so extreme as to display clear inability to render fair judgment." Pet. App. 36a-37a (citation and internal quotation marks omitted).

legal system." 334 F.3d 1128, 1142 (D.C. Cir. 2003). The district court defended the activities of another special master, holding that he had "engaged in no untoward conduct and demonstrated no bias or partiality," 310 F. Supp. 2d 102, 104 (D.D.C. 2004), and declaring that the government's "charges of impropriety are misdirected and more properly should have been leveled at" the government itself, *id.* at 117. When the court of appeals considered the same undisputed facts, however, it found it "difficult to imagine a more biased way of conducting and reporting upon an investigation." *In re Kempthorne*, 449 F.3d 1265, 1271 (D.C. Cir. 2006).

Thus, even if the district court's reversed legal rulings are viewed in isolation from the disparagement of DOI contained in the July 12, 2005, opinion, those rulings cannot properly be regarded as the sort of isolated good-faith mistakes that are to be expected over the course of protracted litigation.

c. In any event, the court of appeals is in the best position to determine the extent to which this series of prior reversals casts doubt on the district court's objectivity here. Ten members of the D.C. Circuit participated in one or more of the eight appeals in which orders of the district court were set aside. Pet. App. 35a. No judge dissented from any of those rulings, *ibid.*, and no judge called for a vote on petitioners' request for en banc review of the reassignment order, see *id.* at 89a-90a. For this Court to immerse itself in the complex history of this protracted litigation, all to resolve a fact-bound question in an area where the governing legal standard is undisputed, would not represent a sound use of the Court's resources.

4. Petitioners suggest (Pet. 18-19) that review by this Court is necessary "to prevent parties from too eas-

ily obtaining the disqualification of a judge." Pet. 19 (emphasis omitted) (quoting *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989), cert. denied, 495 U.S. 957 (1990)). The court of appeals took care, however, to frame its holding in terms that avoid any such risk. The court recognized that its reassignment power should be exercised "only in extraordinary circumstances." Pet. App. 28a. Relying on the "seemingly unique circumstances" of this case, including the combination of the district court's extraordinary disparagement of DOI as an institution and the pattern of prior reversals, the court "conclude[d], reluctantly, that this is one of those rare cases in which reassignment is necessary." *Id.* at 37a.

While recognizing that reassignment is seldom appropriate, the court of appeals explained that it is sometimes necessary because "reasonable observers must have confidence that judicial decisions flow from the impartial application of law to fact, not from a judge's animosity toward a party." Pet. App. 37a. The court observed that, in the rare case that meets the *Liteky* standard, reassignment is essential to preserve both the appearance and the reality of fairness. *Id.* at 31a. The court of appeals correctly held that this is such a case, and its ruling creates no danger that the reassignment power will be exercised indiscriminately in future litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

ELOUISE PEPION COBELL, *ET AL.*, PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY,
DEPARTMENT OF THE INTERIOR, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

Page

Table of Authorities ii

Reply Brief 1

Conclusion 10

TABLE OF AUTHORITIES

Page(s)

CASES:

Cobell v. Norton (Cobell V), 91 F.Supp.2d 1 (D.D.C. 1999) 1

Cobell v. Norton (Cobell VI), 240 F.3d 1081 (D.C. Cir. 2001) 1, 9

Cobell v. Norton (Cobell VIII), 334 F.3d 1128 (D.C. Cir. 2003) 9, 10

Cobell v. Norton (Cobell XII), 391 F.3d 251 (D.C. Cir. 2004) 4, 9

Cobell v. Norton (Cobell XIII), 392 F.3d 461 (D.C. Cir. 2004) 4, 9

Focus Media, Inc., In re, 378 F.3d 916 (9th Cir. 2004), *cert. denied*, 544 U.S. 968 (2005) 7

Kempthorne, In re, 449 F.3d 1265 (D.C. Cir. 2006) 10

Liteky v. United States, 510 U.S. 540 (1994) 4, 6

McLaughlin v. Union Oil Co. of Cal., 869 F.2d 1039 (7th Cir. 1989) 7

STATUTES AND RULES:

28 U.S.C. §§ 455(a)-(b) (2000) 1, 6

28 U.S.C. § 2106 (2000) 1, 6

Table of Authorities Continued

Page(s)

Other Authorities:

The Indian Money Account Claim Satisfaction Act of 2003: Hearing on S. 1770 Before the S. Comm. on Indian Affairs, 108th Cong. 2 (2003) (statement of James Cason, Assoc. Deputy Sec'y, Dep't of the Interior) 1-2

Trustee-Delegates' brief in opposition reinforces rather than undermines the need for the Court's review in this case. Much of their brief simply is irrelevant to the question presented in our petition and seeks to distract the Court from the compelling reasons to grant certiorari. Moreover, their brief says precious little about the central issue: the law that should govern removal and reassignment decisions under 28 U.S.C. §§ 455(a) and 2106 and the conflict between the decision below and those of this Court and other courts of appeals. The following propositions – which are largely undisputed in Trustee-Delegates' brief – firmly demonstrate that this Court's review is warranted.

1. Trustee-Delegates ignore the public significance of this case. As explained in the petition (Pet. 1-6, 15), the litigation seeks to redress grievous – and now admitted – breaches of fundamental fiduciary duties owed to 500,000, largely economically-deprived, Indian-Beneficiaries that have occurred for more than a century and that continue even today. The trust consists of the beneficiaries' own property – in aggregate, approximately 11 million acres of resource-rich and highly-productive land and the proceeds therefrom. As the court of appeals itself previously recognized, the beneficiaries "rely upon their IIM trust accounts for their financial well being .... '[T]he interests at stake are not merely economic interests ... but personal interests in life and health.'" *Cobell v. Norton (Cobell VI)*, 240 F.3d 1081, 1097 (D.C. Cir. 2001) (citation omitted); *accord Cobell v. Norton (Cobell V)*, 91 F.Supp.2d 1, 47 (D.D.C. 1999).[1]

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[1] Trustee-Delegates try to minimize the significance of the case by representing that the trust accounts have a total balance of approximately $400 million. Although that surely is a great deal of money, especially to many of the Native Americans who are members of the certified class in this lawsuit, it is in fact incorrect and grossly understates the amounts at issue. Indeed, the government readily concedes that this case involves an accounting of more than $13 billion – the proceeds of plaintiffs' trust lands though the year 2000 – plus interest accrued and that more than $300

2. Nor do Trustee-Delegates dispute the grave and delicate nature of the removal of a sitting federal judge on the ground of apparent judicial bias. That is especially so where, as here, the removal is based on the substantive correctness of the judge's rulings in carrying out his judicial office. The standard governing removal must be carefully formulated and faithfully applied in order to preserve the crucial independence of the judiciary, promote the sound administration of the federal judicial system, afford basic fairness to the individual judges involved, and protect the legitimate interests of all litigants.

3. As explained in the petition (Pet. 14-15, 17), the court of appeals' removal and reassignment decision rested on "the combination" (Pet. App. 37a) of (a) the statements in Judge Lamberth's July 12 opinion and (b) the appellate reversals of eight of Judge Lamberth's decisions (out of more than 60 published decisions, and well over a 100 other unpublished rulings or orders, over the 10-year course of this lawsuit). The court of appeals was unambiguous that its decision was based upon this "combination" (*id.*) and that it did "not decide whether such [statements], standing alone, require reassignment." *Id.* at 34a. Trustee-Delegates agree with our analysis. *See* Br. in Opp. 7-8, 11-12.

Accordingly, if, as petitioners demonstrate, the court of appeals committed legal error in relying upon the reversals to establish apparent bias, it logically and necessarily follows that the judgment below must be reversed. That is, if the reversals are, as a matter of law, eliminated from the combination upon which the court of appeals founded its decision, only the

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million is produced each year from the land corpus of this trust. *See The Indian Money Account Claim Satisfaction Act of 2003: Hearing on S. 1770 Before the S. Comm. on Indian Affairs*, 108th Cong. 2 (2003) (statement of James Cason, Assoc. Deputy Sec'y, Dep't of the Interior); *see* Pet. 3.

statements in the July 12 opinion, "standing alone" (Pet. App. 34a), would remain as the sole basis for removal and reassignment – a conclusion that the court expressly disavowed. Thus, to sustain the judgment below, the court of appeals' treatment of the reversals, as one of the two factors in the essential combination that supported (in the court's view) an inference of apparent bias, must be legally correct. That is the question presented in the petition for certiorari.

4. It is a puzzlement, therefore, that Trustee-Delegates devote such an enormous amount of space in their brief in opposition to a discussion of the statements in the July 12 opinion. *See* Br. in Opp. 3-5, 6-7, 10-11 (approximately seven of the brief's 15 pages). For purposes of this petition, that factor in the combination is simply and utterly irrelevant. Trustee-Delegates' lengthy discussion evidently is designed to prejudice the Court's view of the case and to divert the Court's attention from the issue raised.

This is not to be understood, however, to indicate petitioners' agreement with either Trustee-Delegates' or the court of appeals' analysis of Judge Lamberth's statements. Quite the contrary, as the petition noted (Pet. 17 n.14), we respectfully but vigorously disagree that these statements support removal and reassignment. The district judge's harsh criticisms were based on record evidence and described accurately the conduct of Trustee-Delegates and the appalling manner in which they have mismanaged petitioners' assets for a century (and continue to do so today). Indeed, the court of appeals itself recognized, as Trustee-Delegates are forced to concede (Br. in Opp. 6-7), that by and large the harsh language in the July 12 opinion was *fully justified* and that it too had sharply criticized Trustee-Delegates in comparably strong terms:

> Although the July 12 opinion contains harsh – even incendiary – language, much of

> that language represents nothing more than the views of an experienced judge who, having presided over this exceptionally contentious case for almost a decade, has become "exceedingly ill disposed towards [a] defendant" that has flagrantly and repeatedly breached its fiduciary obligations. *Liteky*, 510 U.S. at 550, 114 S.Ct. 1147. We ourselves have referred to Interior's "malfeasance," "recalcitrance," "unconscionable delay," "intransigen[ce]," and "hopelessly inept management." *Cobell VI*, 240 F.3d at 1096, 1109; *Cobell XII*, 391 F.3d at 257; *Cobell XIII*, 392 F.3d at 463.
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> * * * * *
>
> Interior's deplorable record deserves condemnation in the strongest terms. Words like "ignominious" and "incompetent[t]" (the district court's) and "malfeasance" and "recalcitrance" (ours) are fair and well-supported by the record.

Pet. App. 32a, 33a.[2]

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[2] Indeed, as this Court recognized in *Liteky v. United States*:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill-disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to the completion of the judge's task. As Judge Jerome Frank pithily put it, "impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."

510 U.S. 540, 550-51 (1994) (citation omitted).

Moreover, even those statements in the July 12 opinion that the court of appeals professed to find "more troubling" were based *entirely* on evidence of record and addressed issues clearly pertinent to the litigation. Because Trustee-Delegates have committed long-standing breaches of trust that continue to this day, the background of Interior's trust malfeasance is relevant to this litigation. Indeed, that background is crucial – particularly when "not even the government ... doubts that racism ran rampant at Interior a century ago." Pet. App. 32a. And Judge Lamberth's criticisms of Trustee-Delegates' conduct in this matter appropriately recognized that trust violations have endured for a century and that the effects of these violations persist and must be remedied.[3]

For this reason, the court of appeals was wrong in concluding that Judge Lamberth "all but accuse[d] *current* Interior officials of racism." *Id.* To observe what is irrefutable – that Interior is the "hand-me-down" of a "racist" *past* – is not to say that it is *currently* racist. *Id.* at 32a. Moreover, to root the current tragedy of trust mismanagement in Interior's historical indifference to a group of citizens the Department was, and is, charged with serving hardly misstates the case.[4]

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[3] Furthermore, contrary to what the court of appeals concluded, "Interior's motive[s]" are highly relevant here. Pet. App. 33a. The court necessarily must understand the root causes of Interior's "recalcitrance" and "malfeasance," and why Trustee-Delegates have acted the way they have, as a critical first step to determine an effective remedy for what the court of appeals itself called Trustee-Delegates' "deplorable record." *Id.*

[4] Equally well-founded was Judge Lamberth's statement that "our government still treats Native American Indians *as if* they were somehow less deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal." *Id.* at 33a (emphasis added). This is merely a statement of the obvious – that no person deserves to be treated in the manner beneficiaries have been: their own property "managed" by their government without their consent, and then to have this self-imposed "trustee" grossly mismanage that property for generation after generation. Plaintiff-Beneficiaries have indeed been treated "as if" they are citizens without rights or remedies.

The court of appeals also expressed concern that Judge Lamberth "ha[d] condemned not just Interior's particular failures as trustee, but the Department as an institution." Pet. App. 34a. That statement is simply inaccurate. At no time did Judge Lamberth express that view, and the court of appeals cited nothing in the opinion below that addressed Interior's conduct outside the trust context. Indeed, as the court of appeals elsewhere acknowledged, Judge Lamberth explicitly refused to concede "that [Interior's] negligence and incompetence ... are beyond judicial remedy" – clear indication that Judge Lamberth did not believe Interior is beyond redemption. Pet. App. 24a. Nothing in the July 12 opinion reasonably suggests otherwise.

5. Turning, then to the issue presented in the petition, Trustee-Delegates – surprisingly, but revealingly – offer virtually no legal analysis of the court of appeals' use of its reversals of Judge Lamberth to support the conclusion of his apparent bias. In fact, the entirety of their response on the law occupies but a single printed page comprising two paragraphs. *See* Br. in Opp. 9.[5]

Trustee-Delegates first contend that the court of appeals correctly cited to and quoted from this Court's decision in *Liteky*. That is indisputable, and indeed the petition acknowledged as much. *See* Pet. 19. It also is beside the point. Such judicial draftsmanship does not insulate the court of appeals' holding and judgment from review by this Court. The salient issue is whether the court of appeals' removal and reassignment decision based on consideration of the reversals

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[5] Trustee-Delegates also stress (Br. in Opp. 12 n.2) that the court of appeals never affirmatively concluded that Judge Lamberth was not actually biased. That is both true and irrelevant. The court of appeals squarely grounded its decision solely on apparent judicial bias under 28 U.S.C. §§ 455(a) and 2106 and did not rely on actual bias under Section 455(b). Thus, as the petition correctly stated; "In basing reassignment on th[e] appearance of partiality, the court [of appeals] did not determine or even suggest that Judge Lamberth was actually biased or prejudiced." Pet. 14.

of Judge Lamberth complies with the law. That the panel was aware of the relevant rulings of this Court does not answer that question. Rather, for the reasons stated at length in the petition – which Trustee-Delegates essentially ignore – the decision below was erroneous as a matter of law.

6. The court of appeals' removal and reassignment decision also conflicts with the decisions of this Court and of other circuits. Once again, Trustee-Delegates blink this issue. They address not one of the many cases or other authorities cited in the petition and present not one case or legal authority of their own. *See* Br. in Opp. 9.

In a three-sentence paragraph, Trustee-Delegates attempt to brush aside our demonstration of a conflict. This is nothing more than their unsubstantiated say-so. We stand on our submission in the petition.

Without burdening the Court with repetition, the disagreement among the circuits is readily illustrated. The court below looked to the reversals as "'*evidence* of . . . bias or prejudice.'" Pet. App. 34a (citation omitted). By contrast, the Seventh Circuit has held that "[b]ias cannot be inferred from a mere pattern of rulings by a judicial officer . . . erroneous as that [officer's] view [of the law] might be"; rather, because the rulings themselves cannot give rise to an inference of bias, there must be some "evidence that the [judicial] officer had it 'in' for the party for reasons unrelated to the officer's view of the law." *McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039, 1047 (7th Cir. 1989) (Posner, J.). Likewise, the Ninth Circuit has rejected the argument that a district judge's "error is itself evidence of bias." *In re Focus Media, Inc.*, 378 F.3d 916, 930 (9th Cir. 2004), *cert. denied*, 544 U.S. 968 (2005). *See* Pet. 21.

7. Furthermore, the court of appeals offered no legal standard for determining whether a district judge's rulings, later reversed on appeal, constitute evidence of apparent bias rather than simply being legal errors reached in good faith by a

conscientious, but fallible human being. Nor did it afford any explanation why the reversals of Judge Lamberth in this case were evidence of apparent bias and not merely the result of the ordinary operation of a legal system that provides appellate review – but not removal and reassignment – as the remedy for the errors of a lower court.

Here, the court of appeals asserted that removal and reassignment could be based on appellate reversals that constitute "evidence" of judicial partiality. Pet. App. 34a. It then concluded that the reversals in this case are evidence of apparent bias. However, there was no analysis to connect the premise to the conclusion or to distinguish between most reversals that reflect nothing more than judicial error and those rare reversals that are evidence of the appearance of judicial prejudice.

In particular, the various facts recited by the court of appeals – the number of reversals, the unanimity of the panels, and the applicable standard of review – do not serve as a legal test for resolving the issue of apparent bias in this case or in others. Even unanimous reversals and appellate conclusions of abuse of discretion do not indicate bias rather than error or cast doubt on the *bona fides* of the district judge. Similarly, even a series of appellate reversals – and the court of appeals gives no indication of how many are needed to raise concern – is far less likely to evince apparent bias than good-faith error, especially where, as here, they involve a small minority of the large number of rulings rendered on a vast array of issues in the course of protracted, complex, and contentious litigation.

Given the sensitivity of judicial removal and reassignment decisions, and given the strong presumption in the law that judges are impartial unless the challenging party satisfies its substantial burden to prove partiality (*see* Pet. 16-17), the court of appeals' *ipse dixit* plainly is insufficient.

8. The petition analyzes at considerable length the reversals cited by the court of appeals and demonstrates why they do not constitute any evidence of apparent judicial bias. *See* Pet. 9-15, 23-28. Once more, Trustee-Delegates offer no response. Thus, it stands unrefuted, for example, that:

- it was misleading and unfair for the court of appeals to exclude from its appellate tally the seminal decision in *Cobell VI*, which was a major victory for Petitioner-Beneficiaries and remains the single most significant decision in this litigation. *See* Pet. 7-9, 24.
- *Cobell XIII* does not demonstrate error, let alone apparent bias, since it was based upon a statutory change in law enacted by Congress after Judge Lamberth had rendered his decision. *See* Pet. 12, 25.
- *Cobell XII*, while vacating on narrow procedural grounds and remanding for further factual proceedings to develop a current and complete record, in fact affirmed Judge Lamberth on the law and rejected all of Trustee-Delegates' principal legal arguments. Pet. 11, 24-25.
- *Cobell VIII*, although reversing a contempt citation, surely does not signify judicial bias; if anything, a prejudiced or vindictive judge out to get Trustee-Delegates presumably would have proceeded in criminal contempt rather than in civil contempt as Judge Lamberth did. Pet. 10, 25-26.

While ignoring the bulk of the reversals cited by the court of appeals, Trustee-Delegates do discuss (albeit only in passing) two of the appellate decisions. *See* Br. in Opp. 12-13. Both involve not Judge Lamberth's own actions but rather those of

special masters used in this complex suit. Neither comes close to demonstrating apparent bias.

First, Trustee-Delegates cite *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006). Although they quote colorful language that the court of appeals found it "difficult to imagine a more biased way of conducting and reporting on an investigation" (*id.* at 1271), that criticism in fact was leveled not at Judge Lamberth, but at a special master and his inappropriate hiring of staff to aid with his investigation. The appellate decision thus related to the conduct of the master. Indeed, because it was a direct mandamus proceeding in the court of appeals, *Kempthorne* did not involve any rulings – let alone any errors, and certainly no apparent bias – by Judge Lamberth. *See* Pet. 13-14, 24.

Second, with respect to *Cobell VIII*, it bears noting that the United States consented to the appointment of the special master with the broad powers ultimately complained of by the United States. *Cobell VIII*, 334 F.3d at 1133. More important still, nothing in *Cobell VIII* remotely suggests bias; instead, if anything, it is merely an example of a conscientious district court committing error by imbuing a master with powers agreed to by the parties but which the court of appeals later found inappropriate. Moreover, although the court of appeals vacated the contempt citation in *Cobell VIII* on a technical legal ground, it agreed with the factual premise animating the district court's finding of misconduct: Trustee-Delegates issued "misleading" reports about trust reform. *Id.* at 1149.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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